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IN THE

Supreme Court of the United States

October Term, 1957.

No. 442

MILDRED S. STINSON, as Administratrix of the Estate of A. BRUCE STINSON, Deceased, Suing as Such Administratrix,

Petitioner,

v.

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA.

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IN THE

Supreme Court of the United States.

October Term, 1957

No.

MILDRED S. STINSON, AS ADMINISTRATRIX OF THE ESTATE OF A. BRUCE STINSON, DECEASED, SUING AS SUCH ADMINISTRATRIX,

Petitioner

v.

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA.

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States.

MILDRED S. STINSON, by her attorneys, respectfully requests that a Writ of Certiorari issue to review the final judgment of the Supreme Court of Alabama entered on June 20, 1957.

OPINIONS BELOW.

A photostatic copy of the original opinion of the Supreme Court of Alabama, filed March 31, 1955, and certified by the Clerk of that Court to be a "full, true and correct" copy of said opinion appears at pages 1a to 13a of the Appendix to this Petition. The opinion of the Supreme Court of Alabama, dated June 20, 1957, on the judgment here for review is reported at — Ala. —, — So. 2d, —, and merely adopts the original opinion of March 31, 1955. It appears at pages 25a to 26a of the Appendix. What *purports* to be the original opinion is reported sub nom. *Atlantic Coast Line Railroad Company v. Stinson*, 264 Ala. 522, 88 So. 2d 189, and appears at pages 15a to 24a of the Appendix. These published reports, however, contain curious and unexplained material differences from the certified copy furnished to counsel by the court. No notice of any alteration or amendment of the original opinion was ever given to counsel.

JURISDICTION.

The judgment of the Supreme Court of Alabama was entered on June 20, 1957 (R. 326).[1] The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3) since rights are claimed by petitioner under a statute of the United States.

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1. All further references are to the pagination of the record of the second trial.

QUESTION PRESENTED.

Where, in an F. E. L. A. action, a fireman moved a train (1) without authority and (2) without giving the proper signals, both of which were violations of the company rules and which the Supreme Court of Alabama conceded to be sufficient evidence of negligence, and where petitioner's decedent, the engineer, was killed by that very move, was not the holding of the Alabama Court that the negligence did not "proximately cause" the accident an application of a wrong rule of law, "capricious or unreasonable", in conflict with the decisions of this Court and of the several Courts of Appeals, and did it not "evince hostility to the federal statute"?

THE STATUTE INVOLVED.

The Federal Employers' Liability Act, 45 U. S. C., § 51 [Apr. 22, 1908 c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404] which provides as follows:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment . . . "

STATEMENT OF THE CASE.

1. *Procedure and How Federal Question is Presented*

Petitioner instituted suit in the Circuit Court of Jefferson County, Alabama, on September 18th, 1952 claiming rights under the F. E. L. A., 45 U. S. C. § 51 *et seq.* for the death of her husband. It came on for trial on June 8, 1953. Then respondent began a series of the most dilatory tactics imaginable, protracted and repeated throughout the entire trial, until the verdict on June 12, 1953: see Record, *passim*. Respondent's motion for a new trial was argued August 21, 1953, and was finally decided, adversely to respondent, on February 26, 1954—over 6 months later.

Respondent appealed to the Alabama Supreme Court in March, 1954, but no argument was had until November 24, 1954—8 months later. Four months more elapsed before the Supreme Court handed down its decision, on March 31, 1955, reversing and remanding. A timely motion for rehearing was filed by petitioner within 15 days, which was refused on June 21, 1956—a delay of one year and three months.

Then, petitioner found herself starting over again, without the opportunity for a direct review by this Court, because instead of having a final judgment, she had only a new trial with no additional evidence available.

Petitioner returned to Jefferson County in November, 1956, and offered the previous record in evidence. The trial court in obedience to the previous mandate of its Supreme Court directed a verdict for respondent. Petitioner appealed the same day. Seven months later, and over 4 years after the original trial, petitioner at length obtained a final judgment, entered June 20, 1957, which she could bring here for review.

At the trial all of the evidence came from respondent's employees, called by petitioner. Respondent put on no defense, and there was no conflict in the evidence.

2. *The Facts.*

This is a case of a railroad engineer who was cut in half when his fireman moved the train without authority and without signals.

On the day after the accident, the fireman was discharged by respondent for "inexcusable violation of the rules endangering property and life and operating an engine in the absence of the engineer" (R. 170).

The Supreme Court of Alabama conceded the fireman's negligence in violating the rules, but held the case not submissible to a jury on the question of causation.

In essential detail the uncontradicted evidence was as follows:

On August 6, 1951, a wrecking train (Work Extra 1707) proceeded west from Ramer, Alabama to the scene of a five car derailment (R. 85). The crew was: Engineer Stinson (petitioner's decedent), Fireman Cook, Conductor Cloud and Brakemen Hays and Murphy (R. 120).

Beginning at its east end the train was made up of the following cars (R. 146):

Caboose
Living and white dining car
Kitchen car
Bunk car
Flat car with wheels and rails (wheel car)
Gondola car with coal
Gondola car with ties
Engine
Wrecker tank
Wrecker.

After cutting off all seven cars behind the engine (R. 122), Stinson moved (R. 171) the engine and the wrecker cars four car lengths up to the wreck (R. 123). When Stinson had spotted the engine (R. 171) for the re-railing, fireman Cook left the engine and walked to the wreck with Stinson still aboard the engine (R. 171).

Cook never again saw Stinson alive (R. 173, 174). At 10:15 P. M., another wreck train, the Western Wrecker, arrived at the western end of the derailed cars (R. 95). At 10:30 P. M., No. 1707 left for Ramer, operated by fireman Cook, who was not a qualified engineer (R. 171). Within those fifteen minutes, these events occurred in this sequence:

(a) The fireman of the Western Wrecker, McClain, left his engine and walked seven car lengths (R. 85), or 315 feet to No. 1707.

(b) McClain had a conversation with Stinson in the cab of 1707 (R. 189).

(c) Stinson walked nine car lengths, or 405 feet, to the dining car and ordered a meal for himself and fireman Cook (R. 115).

(d) Both dinner plates were prepared (R. 115, 116).

(e) Stinson ate his dinner (R. 115, 116, 118).

(f) Stinson left the dining car in haste, leaving behind the fireman's dinner plate (R. 116) and his own hat (R. 99).

In those same fifteen minutes fireman Cook made two separate movements of the engine, the second of which was a coupling move. It is an inescapable inference (and probably the only one) that the impact of the coupling startled Stinson into an awareness that his engine was being moved without authority and in his absence, and that it was this realization which sent him from the diner in such great haste.

Fireman Cook then operated the train all the way back to Ramer with Stinson's whereabouts unknown (R. 173, 174, 175).

Stinson's body was found about 4,000 feet from the point of the derailment (R. 199). The lower part was be-

tween the rails, with the feet angling down the hill toward the west (R. 199). The upper part was north of the rail, with the head also angled to the west (R. 199). The arms were pulled back to the shoulders; the hands were gripped (R. 200). The body had been dragged easterly to a point about 150 feet east of where his clothes were found "in a wad" (R. 200). There was blood on the tracks and scuff marks indicated he had been dragged east toward Ramer (R. 200, 201, 206).

When the train was later inspected, a great deal of blood was found on the northeast wheel of the wheel car (R. 101, 102, 106, 108, 147) and a small amount on the body bolsters and truck bolsters of the same car (R. 101, 102). Portions of the stomach and lungs were found between the brackets of the wheel (a roll of metal cast into the inside of the wheel) (R. 102). There was no blood on the wheels of the caboose or of the other cars between it and the wheel car (R. 130).

Respondent's Rule 994 provides as to firemen (R. 142):

> "They must remain on engines during switching operations, unless otherwise directed. They must take charge of the engine should the engineman be absent, and must not leave the engine during absence of engineman, nor permit any unauthorized person upon the engine. If engineman should become disabled they must stop the engine. *They must not run the engine in the absence of the engineman* unless, in an emergency, they are directed to do so by the conductor or some other person in authority." (Emphasis supplied.)

In spite of this Rule, and although he had no authority from the conductor or any other person in authority (R. 126), and was not a qualified engineer (R. 171), fireman Cook ran the engine two and one-half to three miles east to Ramer in the absence of engineman Stinson (R. 173).

Respondent's Rule 30 provides (R. 195):

> "The engine bell must be rung when an engine is about to move except in instances where the stop and start, either forward or backward, is momentary, and is a continuous switching move and while approaching and passing public crossings at grade, while passing through yards and stations, when passing trains on an adjacent track, and when necessary to prevent accidents."

The bell was not rung at all although to ring it merely involved turning a valve (R. 173).

Respondent's Rule 14(h) requires three short blasts of the whistle when a standing train intends to back (R. 197, 198). No whistle was blown before the move to Ramer began (R. 173).

Factually these established numerous adequately supported inferences that Stinson was directly killed because of one or more of the conceded negligent acts.

On this evidence, the original jury returned a verdict for petitioner of $46,600.00 (R. 30, 31). There followed the state court proceedings described above, in the course of which there occurred the curious and extraordinary episode in connection with the opinions in this case.

REASONS FOR GRANTING THE WRIT.

For the purpose of clarity, a statement of reasons for granting the writ is here set forth. These are expanded in the argument following this resumé.

1. The decision below formulated erroneous rules of law in conflict with the decisions of this Court.

(a) It formulated an erroneous rule of law in conflict with *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409 (1944); *Coray v. Southern Pac. Co.*, 335 U. S. 520, 69 S. Ct. 275 (1949); *Schulz v. Pennsylvania Railroad Company*, 350 U. S. 523, 76 S. Ct. 608 (1956); and *Rogers v. Missouri Pacific Railroad Co.*, 352 U. S. 500, 77 S. Ct. 443 (1957), rehearing denied 353 U. S. 943, 77 S. Ct. 808 (1957).

(b) It erroneously held that unless there was affirmative proof that an F. E. L. A. employee was injured or killed at a point where his duties required him to be, there could be no causative negligence. This is in conflict with *Tennant v. Peoria & P. U. Ry. Co., supra; Schulz v. Pennsylvania Railroad Company, supra,* and *Ringhiser v. Chesapeake & Ohio Railway Co.*, 354 U. S. 901, 77 S. Ct. 1093 (1957).

(c) Having erroneously required affirmative proof of coincidence of duty location and injury location [See 1(b), *supra*], it erroneously refused to follow the presumption announced by this Court that decedent was, in fact, where his duties required him to be when killed: *Tennant v. Peoria & P. U. Ry. Co., supra.*

2. Since these erroneously formulated rules of law were applied by the court below, its decision necessarily resulted in "clear legal error" from the application of "wrong legal standards to the particular facts before it": Cf. *Rogers v. Missouri Pacific Railroad Co., supra,* at 352 U. S. 562, 77

S. Ct. 480; and *McBride v. Toledo Terminal Railroad Company*, — U. S. —. 77 S. Ct. 1398 (1957).

3. The decision below was "capricious [and] unreasonable action" and "evinced hostility to the federal statute": Cf. *Rogers v. Missouri Pacific Railroad Company, supra,* at 352 U. S. 562, 77 S. Ct. 480; and *McBride v. Toledo Terminal Railroad Company, supra,* at — U. S. —, 77 S. Ct. 1398.

4. The decision below is in conflict with the decisions of the Courts of Appeals in the Second Circuit in *Anderson v. Baltimore & O. R. Co.*, 89 F. 2d 629 (C. A. 2, 1937), cert. den. 302 U. S. 696, 58 S. Ct. 14 (1937); in the Third Circuit in *Hoyt v. The Central Railroad,* 243 F. 2d 840 (C. A. 3, 1957); and in the Seventh Circuit in *Eglsaer v. Scandrett, et al.,* 151 F. 2d 562 (C. A. 7, 1945).

5. In denying petitioner her right to a jury trial, the decision conflicts with the command of this Court in *Tennant v. Peoria & P. U. Ry. Co., supra,* and *Lavender v. Kurn,* 327 U. S. 645, 66 S. Ct. 740 (1946), and therefore, "special and important reasons for the grant of certiorari" exist: *Rogers v. Missouri Pacific Railroad Company, supra,* at 352 U. S. 510, 77 S. Ct. 451; and see *Wilkerson v. McCarthy,* 336 U. S. 53, 69 S. Ct. 413 (1949) and *Ellis v. Union Pac. R. Co.*, 329 U. S. 649, 67 S. Ct. 598 (1947).

6. The decision below is a grave emasculation of the remedies vouchsafed to untold thousands of F. E. L. A. employees by a solemn Act of Congress.

Unless corrected by the grant of the Petition and reversal of the judgment below, it will breed much additional litigation and numerous appeals on the issues created by the conflict in authorities.

> "Cognizant of the duty to effectuate the intention of the Congress to secure the right to a jury determination, this Court is vigilant to exercise its power of

review in any case where it appears the litigants have been improperly deprived of that determination. Some say the Act has shortcomings and would prefer a workmen's compensation scheme. The fact that Congress has not seen fit to substitute that scheme cannot relieve this Court of its obligation to effectuate the present congressional intention by granting certiorari to correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction. . . .'' *Rogers v. Missouri Pacific Railroad Co., supra,* 352 U. S. 509, 77 S. Ct. 450.

ARGUMENT.

Introduction.

The original opinion of March 31, 1955, furnished to counsel by the Clerk of the Alabama Supreme Court and certified as a "full, true and correct" copy refers to causal relationship in seven different places. Oddly enough when "that" opinion of the Alabama Supreme Court was published at 264 Ala. 522, 88 So. 2d 189 (1956), over a year after the original opinion was filed, the words "in whole or in part" had been added to five of the seven references to "proximate" causation. This discrepancy must now be faced. The opinion on the judgment presently under review in this Court merely adopts the original opinion of March 31, 1955. Thus to determine the reasoning underpinning this judgment we have to return to the certified "full, true and correct" copy of the original opinion, but when we do we find that it was transmuted in the reports. This alteration occurred without notice to counsel.

Here follows a parallel comparison between the pertinent portions of the original opinion, reproduced photographically in the Appendix (1a to 13a), *infra* and those reported at 264 Ala. 522, 88 So. 2d 189 (15a to 24a). All emphases are supplied.

Original Certified Opinion	Published Opinion
1. "Under the plain provisions of the Federal Employers' Liability Act the gist of the action is negligence on the part of the defendant which *proximately caused* the injury complained of. The plaintiff is required	"Under the plain provisions of the Federal Employers' Liability Act the gist of the action is negligence on the part of the defendant which *in whole or in part proximately caused* the injury complained of.

Original Certified Opinion	Published Opinion
to present probative facts from which the negligence alleged and the *casual relation* between the negligence and the injury complained of can be reasonably inferred before such issues may be submitted to the jury." (7a-8a)	The plaintiff is required to present probative facts from which the negligence alleged and the *causal relation* between the negligence and the injury complained of can be reasonably inferred before such issues may be submitted to the jury." (20a-21a)
2. "In *Lavender v. Kurn,* supra, the Supreme Court of the United States held that the case was a case for the jury, that actionable negligence may be established by circumstantial evidence and that where the jury returns a verdict on probative facts from which negligence which *proximately caused* the injury may reasonably be inferred, it is no answer to say that the jury's verdict involved speculation and conjecture." (8a)	"In Lavender v. Kurn, supra, the Supreme Court of the United States held that the case was a case for the jury, that actionable negligence may be established by circumstantial evidence and that where the jury returns a verdict on probative facts from which negligence which *in whole or in part proximately caused* the injury may reasonably be inferred, it is no answer to say that the jury's verdict involved speculation and conjecture." (21a)
3. "* * * the court [in *Lavender v. Kurn*] held that where there was proof of probative facts from which it could be inferred that the negligence of the railroad *caused* the death of the dece-	"* * * the court [*in Lavender v. Kurn*] held that where there was proof of probative facts from which it could be inferred that the negligence of the railroad *in whole or in part proximately*

ORIGINAL CERTIFIED OPINION	PUBLISHED OPINION
dent, the court on appeal would not disturb the verdict on the theory that the jury speculated as to whether death was the result of negligence or grew out of some other cause." (8a)	*caused* the death of the decedent, the court on appeal would not disturb the verdict on the theory that the jury speculated as to whether death was the result of negligence or grew out of some other cause." (21a)
4. "This brings us to what we regard as the vital question in the case. Did the negligence, if any, of the defendant railroad *proximately result* in the death of Stinson?" (10a)	"This brings us to what we regard as the vital question in the case. *Did the negligence, if any, of the defendant railroad in whole or in part proximately result* in the death of Stinson?" (22a)
5. "However, as we have pointed out, there was no evidence as to what happened after he left the diner and we can only speculate as to what *proximately caused* Stinson's death * * *" (11a)	"However, as we have pointed out, there was no evidence as to what happened after he left the diner and we can only speculate as to what *proximately caused* Stinson's death * * *" (23a)
6. "Consequently the evidence fails to show probative facts from which a jury could infer that when Stinson was run over by the train, he was where his duty required him to be. Since this is true, the evidence does not show that the negligence, if any, of the defend-	"Consequently the evidence fails to show probative facts from which a jury could infer that when Stinson was run over by the train, he was where his duty required him to be. Since this is true, the evidence does not show that the negligence, if any, of the defendant *in*

Original Certified Opinion	Published Opinion
ant *proximately caused his death.*'' (11a)	*whole or in part proximately caused* his death.'' (24a)
7. ''* * * *Reynolds v. Atlantic Coast Line R. Co.*, supra. In the last cited case *the Supreme Court of the United States* said:	''* * * Reynolds v. Atlantic Coast Line R. Co., supra. In the last cited case *this court* said:
'A party claiming under the Act must in some adequate way establish negligence, and it must appear that such negligence was the proximate cause, in whole or in part, of the accident.	'A party claiming under the Act must in some adequate way establish negligence, and it must appear that such negligence was *the proximate cause, in whole or in part*, of the accident.
* * *	* * *
'In order to state a cause of action, it must be made to appear by proper averments [and, we interpolate, by proper proof] that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.'' (11a-12a)	'In order to state a cause of action, it must be made to appear by proper averments [and, we interpolate, by proper proof] that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.'' (24a)

At the outset we must be candid with this Court and advise it that we are faced with the problem of dealing not with one, but, in effect, with two opinions below. We propose to treat this bizarre situation created by the court below by establishing the following propositions:

1. If the first opinion is the source of the decision below, it propounds a rule of Federal Employers' Liability Act law in conflict with the rule laid down by this Court and other appellate courts, a conflict of such magnitude as to warrant the grant of the Petition and reversal of the judgment below.

2. The manner in which the altered opinion came into existence, on a set of facts which were unchanged from those of the first opinion, fairly suggests that the second opinion is the spawn of copy-editing rather than the product of jurisprudence. If so, it is the sheerest form of arbitrariness and capriciousness. If the altered opinion is the result of something more substantial than decision-making by copy-editing, then the result on these facts, which are in substance agreed upon, is so incredibly arbitrary and capricious and so manifestly the reflection of studied hostility to the purposes of the Federal Employers' Liability Act that the Petition should be granted and the judgment below reversed.

POINT I.

The Law Propounded in the First Opinion is in Conflict With the Rule Laid Down by This Court and Courts of Appeals.

The passages of the first opinion which use such terms as "proximately caused", "caused", "proximately resulted" and "the proximate cause" obviously demonstrate that the rule of causation promulgated by the court below is in sheer conflict with the applicable rule as formulated in 45 U. S. C. § 51 and the decisional law announced by this Court and the Courts of Appeals under that statute.

The rule expressed in the lower court's first opinion is an outmoded conceptualistic view of causation, extremely narrow and restricted. At the time it issued the first opinion on March 31, 1955, the court below either ignored or overlooked those federal cases which carefully explained how that doctrine had been intentionally expanded and broadened by the use in the statute of the words "in whole or in part"; See *Eglsaer v. Scandrett*, 151 F. 2d 562 (C. A. 7, 1945); *Anderson v. Baltimore & O. R. Co.*, 89 F. 2d 629 (C. A. 2, 1937), cert. den. 302 U. S. 696, 58 S. Ct. 14 (1937); *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409 (1944); *Coray v. Southern Pac. Co.*, 335 U. S. 520, 69 S. Ct. 275 (1949).

Sweeping aside the distinctions which the Utah Supreme Court sought to draw between proximate cause in the legal and philosophical sense, this Court, through Mr. Justice Black said, in *Coray* at page 524 (69 S. Ct. 277):

> "* * * The language selected by Congress to fix liability in cases of this kind is simple and direct. Consideration of its meaning by the introduction of dialectical subtleties can serve no useful interpretative purpose. The statute declares that railroads shall be responsible for their employees' deaths 'resulting in whole or in part' from defective appliances such as were here maintained * * *."

Thus, without reference to what subsequently developed in appellate decisional law between the dates of the lower court's first opinion, and its opinion on the second appeal, even at the time of the first opinion here the federal cases had left no doubt that the old common-law concept of "proximate cause" had no place in suits under this Act. But it was that concept which the Alabama court applied.

Whatever excuse may possibly be offered for ignoring or overlooking these cases, and we submit there can be none, there is no possible reason for the lower court's refusal to

recognize the proper legal standard expressed by this Court in *Rogers v. Missouri Pacific Railroad Co.*, 352 U. S. 500, 77 S. Ct. 443 (1957).

In that case Mr. Justice Brennan vigorously criticized the Missouri Supreme Court for using language of proximate causation.

This Court said of the Missouri Court opinion, at page 506 (77 S. Ct. 448):

> "* * * *That is language of proximate causation* which makes a jury question dependent upon whether the jury may find that the defendant's negligence was the sole, efficient, producing cause of injury." (Emphasis supplied.)

This Court then held as follows at pages 506, 507 (77 S. Ct. pp. 448-449):

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or *in part* [to its] negligence' * * *". (Emphasis the Court's.)

See also *Webb v. Illinois Central Railroad Co.*, 352 U. S. 512, 77 S. Ct. 451 (1957).

Obviously the first opinion in this case is in utter conflict with the above cited cases of this Court and the Courts of Appeals.

Following shortly in the wake of the *Rogers* decision, *supra*, the Court of Appeals for the Third Circuit had occasion to determine the effect of that decision on the legal standard of causation to be applied in Federal Employers' Liability Act cases.

In *Hoyt v. The Central Railroad*, 243 F. 2d 840 (C. A. 3, 1957), Judge Kalodner said at pages 842, 843:

> "Under the Act proof of negligence on the part of the defendant railroad is, as in the common law, a prerequisite to liability. However, the common law concept of proximate cause has been adopted to a lesser extent. At common law the proximate cause of the accident was the efficient cause or a substantial factor in producing the injury. Cf. Restatement, Torts, secs. 431, 433 (1934). Since the Act provides that liability is incurred for injuries resulting 'in part' from the defendant's negligence, liability exists where there are a plurality of causes including the negligent act of the defendant. See Eglsaer v. Scandrett, 7 Cir., 1945, 151 F. 2d 562 . . .
>
> "Thus the situation must be viewed in light of the several factors which may have combined to cause the accident, and if any negligence on the part of the defendant is found among these factors, it would be liable for the resultant injuries. . . . Any instructions to the jury on the element of proximate causation must necessarily define liability to include a greater area than that at common law * * *."

There can be no doubt that the first opinion of the Supreme Court of Alabama is in direct conflict with this

decision of the Court of Appeals for the Third Circuit. The *Hoyt* case reversed the District Court because it used the words "the proximate cause." Yet, using the words "the proximate cause" (12a), the first opinion in this case reverses the trial judge.

From this perspective we now see the magnitude of the conflict generated by the first opinion. If no further appellate decisional law on the point had developed after the announcement of the first opinion below, there would be such conflict as between the rule in the court below and the rule in this Court and Courts of Appeals as to warrant the grant of the Petition. The remedy under the Federal Employers' Liability Act was genuinely emasculated by that conflict. But in fact additional appellate decisional law did develop after the first opinion, and the effect of that new law was to aggravate the error and sharpen the conflict already existing. The *Rogers; Webb* and *Hoyt* cases, *supra*, undeniably erased any remaining vestiges of rigid legalisms such as those applied below in the meaning of causation under the Federal Employers' Liability Act. The first opinion stands alone in its stark error.

Point II.

The Altered Opinion Is in Conflict With the Decisions of This Court and the Several Courts of Appeals.

We have advised this Court of the curious mutation through which the first opinion went between the time of its promulgation and its eventual publication at 264 Ala. 522, 88 So. 2d 189. We shall now proceed to assume that the altered opinion expresses the basis on which the Supreme Court of Alabama decided this case. We must admit, however, that how or why the words "in whole or in part" mysteriously appeared, with no notice to counsel, is not at once apparent. They appeared only after the lapse of more than a year and three months from the date of the original opinion and after the court's basic error had been

pointed out in our petition for rehearing. It may be that the lower court felt that the quiet addition of a magic incantation would somehow or other breathe validity into an indefensible legal position. But whatever the reason for the sudden and unexplained appearance of these words, they remain only words and cannot by their mere presence alter in any way the basic approach of the court to the question of causation or the legal standard which it applied.

Actually, the opinion is at war with itself. While the quotation from *Reynolds v. Atlantic Coast Line* was accurately ascribed in the published opinion to the Alabama Supreme Court instead of to this Court, that quotation with the Alabama phrases "the proximate cause" and "the natural and probable consequences" remained as a basis for the holding. This would tend to support equally the conclusions: (1) that the revision was mere copy-editing carelessly done, and hence pure mechanics, or (2) that the court below persisted in applying its own erroneous rule. However, we shall assume that something more than mere lip service was involved in the revision of the first opinion, and even assume that the revision was internally consistent.

If we make those assumptions we shall immediately see that the court was incredibly arbitrary and capricious and evinced a rampant hostility to the F. E. L. A.

And indeed, the holding is incredible.

The Alabama court conceded that the evidence of the unauthorized movement of the train was sufficient evidence of negligence.

Stinson was cut in half by that same negligent movement.

The Alabama court below necessarily held as a matter of law (assuming it had applied the correct rule), that there was not the slightest causal connection between that movement and the death.

Although we believe that it is unnecessary to state more than this to show how "capricious [and] unreasonable"

the holding of the court was, it might be helpful to indicate how the lower court reached its conclusion. There are four aspects to this analysis.

First, the court ruled as a matter of law that unless the evidence affirmatively shows that an employee is where his duties require him to be, any negligence of his fellow employees cannot be causative negligence under the Federal Employers' Liability Act.

The court said:

> "* * * Consequently the evidence fails to show probative facts from which a jury could infer that when Stinson was run over by the train, he was where his duty required him to be. Since this is true, the evidence does not show that the negligence, if any, of the defendant in whole or in part proximately caused his death * * *". (24a)

Assuming, *pro arguendo*, that petitioner did not affirmatively show that Stinson was where his duties required him to be at the time of the accident, we submit that to say that there must be affirmative and direct proof that an employee was injured or killed at a place where his duties required him to be is as novel as it is startling and as alien as it is erroneous.

In *Schulz, Admx. v. The Pennsylvania Railroad Company*, 222 F. 2d 540 (C. A. 2, 1955), decedent reported for work, checked four tugboats, and then went aboard to change his clothes. He was last seen alive walking in the direction of the nearest tug. His street clothes and lunch were later found on one of the tugs. Three of the tugs were unlighted and one was partially lighted. There was some ice on the tugs, although the ice did not cover them. Decedent's body was found two weeks later floating near an adjacent pier clothed only in shorts and socks. The Court of Appeals affirmed a directed verdict for defendant saying, at page 541:

"* * * The evidence of such alleged negligence was slight, and perhaps at most only doubtfully sufficient to prese it a jury question as to defendant's breach of duty. But beyond this, there was no showing whatsoever that the alleged conditions were causally related to the accident. Plaintiff never contended that the ice completely covered the barges or that the pier or the barges were entirely shrouded in darkness. We have no way of knowing how or where the accident occurred, and cannot say that it was proximately caused by any default on the part of the defendant. * * *".

This Court reversed the directed judgment for defendant: 350 U. S. 523, 76 S. Ct. 608 (1956). The Court said, at page 526 (76 S. Ct. 610):

"In this case petitioner is entitled to recover if her husband's death resulted 'in whole or in part' from defendant's negligence. Fair-minded men could certainly find from the foregoing facts that defendant was negligent in requiring Schulz to work on these dark, icy and undermanned boats. And reasonable men could also find from the discovery of Schulz's half-robed body with a flashlight gripped in his hand that he slipped from an unlighted tug as he groped about in the darkness attempting to perform his duties. But the courts below took this case from the jury because of a possibility that Schulz might have fallen on a particular spot where there happened to be no ice, or that he might have fallen from the one boat that was partially illuminated by shore lights. Doubtless the jury could have so found (had the court allowed it to perform its function) but it would not have been compelled to draw such inferences. For 'The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable'. Fact finding does not require mathematical cer-

tainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn.

"We think the evidence was sufficient to require submission of the case to the jury, and that it was error not to do so."

Surely petitioner here proved as much, if not more, concerning the decedent's whereabouts at the time of the accident than did the petitioner in the *Schulz* case, *supra*.

Second, let us, for the sake of argument, go even further. Let us assume that it was shown affirmatively that Stinson was *not* where his duties required him to be. Even under such assumption, negligence of a fellow employee is causative, as this Court recently held. Cf. *Ringhiser v. Chesapeake & Ohio Railway Company*, 354 U. S. 901, 77 S. Ct. 1093 (1957).

Third, after importing a novel and erroneous requirement of direct proof that the location of death and place of duties coincided, the court committed the further legal error of totally ignoring what this Court said in *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 34, 64 S. Ct. 409, 412 (1944):

"* * * To this evidence must be added the presumption that the deceased was actually engaged in the performance of those duties and exercised due care for his own safety at the time of his death. * * *"

Finally, suppose *Schulz*, *Ringhiser* and *Tennant* had never been decided the way they were. If we take the law to be what the court below says it is, the conclusion it draws on these facts is not just illogical, it is wildly arbitrary and capricious.

The court said (23a-24a):

> ". . . that in going to the diner Stinson was acting within the line and scope of his employment. His next duty would be to return from the diner to the engine . . . . Stinson had no duties to perform in between or alongside the cars of the train, as was the situation in Atlanta & St. Andrews Bay Ry. Co. v. Burnett, supra, and Atlantic Coast Line Railroad Co. v. McMoy, supra, referred to above. Alabama Great Southern R. Co. v. Davis, 246 Ala. 64, 18 So. 2d 737."

Since Stinson could only return to the engine by walking alongside the cars, the very duty recognized by the court would place him precisely where the court said he had no duties.

Out of what could only have been pure arbitrariness, the court below simply turned its back on the record which demonstrates without contradiction that Stinson must have been returning from the diner of the train to his engine very shortly before or at the time of the start of fireman Cook's final move east to Ramer. We know that Stinson left the diner in haste.

The only possible logical explanation for his leaving a place of safety (the diner) in such obvious haste is:

Stinson felt the jolt of the coupling. He realized that some unauthorized person,—and he knew not who,—was operating his engine for which he alone was responsible. It was this realization, stemming directly from the unauthorized operation of the engine, that brought him from safety to fatal peril.

We know also that Stinson left the diner at the end of a preceding sequence of events which must have consumed most of the time within a proven fifteen-minute interval: See Statement of the Case, *supra*, pp. 5-8. He could have been nowhere but at or near the diner, and there is nothing to suggest that he was headed anywhere

but back to the engine in an obvious effort to return to his station for the move to Ramer.

Indeed the evidence points conclusively to the fact that Stinson intended to return to the engine before it moved to Ramer. Otherwise, there would have been no point in his instructions to McClain to "look out for the engine" until he or Cook returned (R. 176), nor to his ordering a plate for the fireman (R. 115, 116). Thus, on the lower court's own terms, Stinson was exactly where his duties required him to be.

That being so, it is a fair—if not the only—inference that Stinson was probably caught up under the train, the tangle of brake beams, rigging, bolsters, trucks and spring plank under the car, as No. 1707 left the wreck. The "wadded up" clothes can be reasonably explained only on the basis that some portion of them was finally caught in the turning axle and inexorably torn from the body, permitting it to drop beneath the wheels. Whether Stinson slipped under the train while hurrying to the engine; whether he was knocked under by the unexpected movement made without warning; or whether he grabbed for a passing handhold which he ultimately lost and dropped under the train several thousand feet after the train started back to Ramer is of no moment. This was for the jury alone to decide. However he got there, he had a right to rely on Cook's compliance with the Rules.

Of course, that violation of Rule 994 and its continued violation in the move back to Ramer, both without knowledge of Stinson's whereabouts, were continuing acts of negligence. These were unquestionably causally related to the death no matter where it occurred. While he was at the scene of the wreck, decedent was entitled to rely on a warning by bell or whistle, or both. He was entitled to rely on the fact that Cook would not violate Rule 994 and operate the engine in his absence.

The ringing of the bell or the blowing of the whistle might well have saved his life: *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409 (1944).

Once the evidence is sufficient for the jury to find that the rule-violating movement was negligent (and this is conceded by the lower court) and that Stinson was killed by that movement at the time of the movement, (and this is beyond peradventure of doubt), we suggest that liability follows automatically. To hold that, on such evidence, the jury could not find that the negligent movement "played any part, even the slightest, in producing the injury or death for which damages are sought"[2] approaches, we submit, the zenith of absurdity.

CONCLUSION.

This Court has been diligent to protect F. E. L. A. claimants' right to jury trials. As this Court said in the *Rogers* case, *supra* at page 510, 77 S. Ct. 451:

> ". . . Special and important reasons for the grant of certiorari in these cases are certainly present when lower federal and state courts persistently deprive litigants of their right to a jury determination."

In cases where the causal relationship between employer negligence and employee injury has been infinitely less obvious than here, it has nevertheless reversed inferior tribunals for their interference with the jury function: Cf., e.g., *McBride v. Toledo Terminal Railroad Company*, — U. S. —, 77 S. Ct. 1398 (1957). There, this Court reversed in a memorandum decision simultaneously with the grant of certiorari, as it has frequently done in cases of this type: See cases collected in Appendix to Mr. Justice Frankfurter's opinion in *Rogers v. Missouri Pacific Railroad Co.*, 352 U. S. 549-558, 77 S. Ct. 472 et seq. (1957); and *Shaw v. Atlantic Coast Line Railroad Company*, 353 U. S. 920, 77 S. Ct. 680, reh. den. 353 U. S. 951, 77 S. Ct. 859 (1957). There is a genuine necessity for reversal here, for

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2. *Rogers v. Missouri Pacific Railroad Co.*, *supra*, 352 U. S. 506, 77 S. Ct. 448.

not only did the lower court manifestly and arbitrarily deny plaintiff a jury trial, but from the face of its own opinion, it applied "wrong legal standards to the particular facts before it": *McBride v. Toledo Terminal Railroad Company*, — U. S. —, 77 S. Ct. 1398 (1957).

We sincerely urge that a more shocking interference with the jury function would be hard to imagine. A decision of this sort, in the face of the oft repeated pronouncements of this Court evinces "hostility to the federal statute",[3] and, as we have shown, is in sharp conflict with numerous decisions of this Court and various Courts of Appeals. It cries aloud for review and reversal.

It would be a monstrous thing to send this case back for a third trial. Indeed, the entire thrust of petitioner's argument is that the Alabama Supreme Court erred when it originally deprived petitioner of her jury verdict and ordered a new trial. Because that decision was not a final order of the highest court of the state, we were powerless to bring it here for review: Act of June 25, 1948, c. 646, 62 Stat. 929, 28 U. S. C. § 1257; *Davis Admrx. v. Alabama Great Southern Railroad Company*, 324 U. S. 846, 65 S. Ct. 676 (1945). Petitioner, therefore, found herself in the intolerable situation of having no additional evidence and having to go through the artificiality of a new trial on precisely the same evidence, suffering a directed verdict and then taking an appeal, the result of which was a foregone conclusion. To subject her to the ordeal of a third trial, four years later, when witnesses may well have died or disappeared and when memories have dimmed, would be a manifest injustice. This Court has the power to prevent such injustice. The Act of June 25, 1948, c. 646, 62 Stat. 963, 28 U. S. C. § 2106, provides:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court law-

3. *McBride v. Toledo Terminal Railroad Company, supra*, 77 S. Ct. 1398.

fully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Under that Act, this Court may direct that the judgment on the verdict be reinstated: *Stanley et al. v. Schwalby et al.*, 162 U. S. 255, 279-283, 16 S. Ct. 745, 764-766 (1896); *Jones National Bank v. Yates*, 240 U. S. 541, 36 S. Ct. 429 (1916); *Urie v. Thompson*, 337 U. S. 163, 196, 69 S. Ct. 1018, 1038 (1949). We respectfully urge that it would only "be just under the circumstances" for the Court to grant the Petition for Certiorari, reverse the judgment below and direct that the verdict of $46,600.00 for petitioner be reinstated together with such interest, costs and penalties as the law of Alabama provides.

Respectfully submitted,

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RECD APR 4 1955

THE STATE OF ALABAMA - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPRING TERM, 1955

6 Div. 736

Atlantic Coast Line Railroad Co.,

v.

Mildred S. Stinson, as Admx., etc.,

Appeal from Jefferson Circuit Court.

SIMPSON, JUSTICE.

This is an action instituted against the Atlantic Coast Line Railroad Company under the Federal Employers' Liability Act by Mildred S. Stinson, as administratrix of the estate of A. Bruce Stinson, deceased, to recover damages for his death. Liability is predicated upon the alleged negligence of the defendant in the operation of its railroad which allegedly caused the death of the deceased, while in its employment. Upon the trial there was a verdict for the plaintiff and a judgment rendered thereon. Motion for a new trial was overruled and hence this appeal.

Appendix.

Original Certified Opinion.

As submitted to the jury the complaint as last amended consisted only of count 5. In substance it alleged that A. Bruce Stinson was an employee of the defendant railroad and was killed while acting within the line and scope of his employment and that the defendant railroad was engaged in interstate commerce at the time of the death of deced . It was further alleged that the death of Stinson resulted from the negligence of one or more of the officers, agents or employees of the defendant, whose name and names are unknown to the plaintiff, while acting within the line and scope of their employment in this to-wit: that he or they so negligently operated the aforesaid railroad train of the defendant as to cause plaintiff's intestate to be run over, upon or against by the said railroad train and as a proximate result and consequence thereof plaintiff's intestate was killed.

The defendant filed a plea of the general issue in short by consent with leave to give in evidence any matter which would be admissible in evidence if well pleaded and with leave to the plaintiff to make like reply.

The proof shows that on August 6, 1951, the crew of Work Extra 1707 consisting of conductor L. B. Cloud, flagman C. C. Hayes, brakeman Joe Murphy, fireman W. P. Cook and engineer A. B. Stinson was called to work at Montgomery, Alabama, to report to Ramer, Alabama, to handle a wrecker for a train that had been derailed. When Work Extra 1707 arrived at Ramer they took over the work train, received the usual work train orders and proceeded to the place of the derailment, which was between 2-1/2 and 3 miles beyond Ramer. They arrived at the scene of the derailment at about 9:45 P.M. At this time Work Extra 1707 was made up of the following cars from the front to the rear:

1. Wrecker
2. Wrecker tank
3. Engine
4. Gondola car of tiles
5. Gondola car of coal
6. Flat car or wheel car
7. Bunk car
8. Kitchen car
9. Living and dining car
10. Caboose.

Upon arrival at the scene of the derailment all cars were cut from the engine except the wrecker cars. The engine and the wrecker cars were then moved forward by Stinson, the engineer, about four car lengths, nearer the derailment and "spotted". After the engine of Work Extra 1707 had been "spotted" by Stinson as aforesaid, its fireman Wm. F. Cook, upon receiving permission from Stinson, left the engine to go to the wreck and "to look around".

At 10:15 another train, the Western Wrecker, consisting of a total of five cars, arrived at the western end of the derailed cars. On this train was a fireman named McClain.

When fireman Cook returned to Work Extra 1707 fireman McClain of the Western Wrecker was in the engine cab of Work Extra 1707 but Stinson was not. McClain told Cook that Stinson had been on the engine when he reached it and had asked him (McClain) to look out for the engine "until Stinson or Cook returned".

There was proof that after Stinson had left his engine he went to the kitchen car of 1707 and ate a plate of food given him by the cook. He left the dining car, leaving his cap on a stool. Stinson did not return to his engine. He was never seen alive after having left the dining car. There was proof that at the time Stinson left the dining car the cars were standing still and they were not moved, according to conductor Cloud, until it was "right at 10:30". Other testimony shows that after rerailing the wrecked car there was a coupling movement to the rerailed car, a lowering of the boom on the wrecker, a coupling to the rest of the train and then that conductor Cloud, who watched this operation, walked back to the caboose at the rear of the train before the move actually started on his signal given from the rear end of the caboose.

Stinson was not found until about two or three hours later after he left the diner when W. C. Stripling, the engineer of Through Train 216, going towards Homer after the track had been cleared, discovered Stinson's finde body severed across the north rail of the track at a point something over three-fourths of a mile from where he had last been seen at the diner. The lower part of Stinson's body was between the rails with the feet angling down the hill toward the west. The upper part was outside the rail with the head turned downhill. The arms were pulled back to the shoulders, the hands were gripped and the body was naked except for the socks. His clothes were found "balled up" about 150 feet from the body toward the derailment. There was evidence of blood on the tracks and scuff marks to indicate he was dragged the 150 feet from the clothes to where the body was found.

There was proof showing that fireman Cook in Stinson's absence in operating the engine made three separate back-up moves. First, after coupling to the derailed hopper, he moved back two car lengths and stopped so that the boom of the wrecking derrick could be swung; second, he moved back the remaining two car lengths, separating the engine from the cut cars in order to couple; third, he moved back two and one-half to three miles to Ramer. This last move was made without incident at about ten miles per hour, the caboose being in the lead.

When the absence of Stinson was noted the train was inspected at Sprague which is a place on the railroad between Ramer and Montgomery. A lot of blood was found on the northeast wheel of the wheel car and a small amount of blood on the wheel next to it. Blood was also found on the body bolsters and truck bolsters of the same car. Portions of the stomach and lungs were found between the brackets of the wheel (a roll of metal cast into the inside of the wheel). There was no blood on the wheels of the caboose or of the other cars between it and the wheel car. So far as we can discover there is nothing in the record to show that any portion of the clothing of the deceased or any shred thereof was found beneath the wheel car or under any other part of the train.

The proof showed rules of the Atlantic Coast Line Railroad Company as follows:

As to Engineers (Enginemen)—Rule 972: "They must not leave their engines during a trip except in cases of necessity, and then the fireman or some other competent person must be left in charge of the engine."

Rule 973:—"They must not permit an unauthorized person to run the engine. They may permit the fireman to do so, but only under their immediate supervision."

As to Firemen. Rule 990:—"Firemen will report to the Trainmaster in all matters connected with the movement of trains and engines; to the Master Mechanic in all matters relating to motive power. They must comply with instructions of the Road Foreman of Engines and other Mechanical Department officers. They must comply with instructions of the enginemen (engineer) while on duty. At stations and yards they are under the jurisdiction of the Station Master or Road Master; within shop limits, of the Engine House Foreman."

Rule 991:—"They must remain on engines during switching operations, unless otherwise directed. They must take charge of the engine should the engineman be absent, and must not leave the engine during absence of engineman, nor permit any unauthorized person upon the engine. If engineman should become disabled they must stop the engine. They must not run an engine in the absence of the engineman unless it is necessary, they are directed to do so by the conductor or some other person in authority."

In addition to the rules governing to the firemen and engineer, the following rules exist:

"Rule 97:—The engine bell must be rung when an engine is about to move except in instances where the stop and start, either forward or backward, is momentary, and in a continuous switching move and while approaching and passing public crossings at grade, while passing trains on an adjacent track, and when necessary to prevent accidents."

Rule 32:—"The unnecessary use of the horn, whistle or bell is prohibited."

Rule 108:—"In case of doubt or uncertainty, the safe course must be taken."

The fundamental question in the case is whether the court erred in refusing the affirmative charge requested in writing by the defendant.

In reviewing the court's refusal to give the affirmative charge in Atlantic Coast Line R. Co. v. Ming, ___ Ala. ___, 73 Sout 85, this court said:

> "Error is predicated on the refusal of the court to give the general affirmative charge with hypothesis. It is well understood that actionable negligence may be established by circumstantial evidence. Atlantic Coast Line R. Co. v. Taylor, Ala. Sup., 71 So. 2d 27; Atlanta & St. Andrews Bay Ry. Co. v. Burnett, 259 Ala. 628, 68 So. 2d 726; Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916; Tennant v. Peoria & P.U.R. Co., 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520. Furthermore, where the affirmative charge was refused the defendant, the entire evidence must be viewed in its most favorable aspect to the plaintiff and where this is done and a reasonable inference may be drawn adverse to the party requesting the affirmative charge, such charge is properly refused. Atlantic Coast Line R. Co. v. Taylor, supra, and cases cited therein. * * *."

Under the plain provisions of the Federal Employers' Liability Act the gist of the action is negligence on the part of the defendant which proximately caused the injury complained of. The plaintiff is required to present probative facts from which the negligence alleged and the causal relation between the negligence and

the injury complained of can be reasonably inferred before such issues may be submitted to the jury. —Atlantic Coast Line Railroad Co. v. Barnes, 75 So2d 91; Reynolds v. Atlantic Coast Line Railroad Co., 251 Ala. 27, 36 So2d 102, affirmed 69 S. Ct. 507, 336 U.S. 207, 93 L. Ed. 618; Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916; Tennant v. Peoria & P.U.R.Co., 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520; Atlantic Coast Line Railroad Co. v. McKay, supra.

There are three cases strongly relied on by the appellee to which we wish to refer at this point. In Lavender v. Kurn, supra, the Supreme Court of the United States held that the case was a case for the jury, that actionable negligence may be established by circumstantial evidence and that where the jury returns a verdict on probative facts from which negligence which proximately caused the injury may reasonably be inferred, it is no answer to say that the jury's verdict involved speculation and conjecture. In Lavender v. Kurn, supra, it was shown that the decedent suffered the injuries from which he died at a place where his duties required him to be. The railroad contended that the decedent was murdered but the court held that where there was proof of probative facts from which it could be inferred that the negligence of the railroad caused the death of the decedent, the court on appeal would not disturb the verdict on the theory that the jury speculated as to whether death was the result of negligence or grew out of some other cause.

This court as it was its duty to do followed the reasoning in the foregoing decision of the Supreme Court of the United States in Atlanta & St. Andrews Bay Ry. Co. v. Burnett, 259 Ala. 688, 68 So2d 726, and in Atlantic Coast Line Railroad Co. v. McKay, supra,

and hold that since there was proof of probative facts from which the jury had a right to infer negligence of the defendant and that the decedent was killed by the railroad at a place where his duties to the railroad required him to be, the court would not speculate as to whether at the time of his death he was doing his duty or engaging in something not pertaining to his duty. We call attention to the fact that both in Atlanta & St. Andrews Bay R.W. Co. v. Barnett, supra, and Atlantic Coast Line R. Co. v. McKay, supra, the work of the decedent required him to work on the ground along side of or between the cars of the defendant railroad.

As we read the present record, there appears to be a conflict in the evidence as to whether fireman Cook in running the engine abided by the rules of the company in making the movements to which we have referred, in the absence of the engineer and in his failure to ring the bell at each movement. Upon a careful consideration it is our view that the plaintiff was entitled to go to the jury on these issues, which means that there was sufficient evidence for the jury to find that there was negligence on the part of the Atlantic Coast Line Railroad Company. Violation of one of defendant's rules is evidence of negligence. Tennant v. Peoria & P. U. R. Co., supra; Tiller v. Atlantic Coast Line, 323 U. S. 594, 65 S. Ct. 421; Alabama Great Southern Railroad Co. v. Davis, 246 Ala. 64, 18 So2d 737.

This brings us to what we regard as the vital question in the case, viz: the negligence, if any, of the defendant railroad proximately causing the death of Skinner?

The proof shows that Skinner's safe body was found covered across the rail of the track about three-fourths of a mile from where he had been seen alive over two hours before. All of his clothes except his socks which he had on were found "bunched up together" about 100 feet nearer to the place where he had last been seen alive than where his body was found. There were markings on the track indicating that something had been dragged between the place where the safe body was and the clothing. There was no evidence, however, as to how the engineer got from the place where he was last seen alive, to the place about three-fourths of a mile away. There was no evidence as to what he was doing and had been doing in the meantime. There was no evidence as to how he became safe. There was no evidence that he was alive and on the track at the time any train approached and passed the point where his body was found.

Can it be said that there was any evidence which showed that Skinner's body was found at a place where his duty required him to be, as was the situation in the cases cited above? The duties of Skinner required him to be on the engine in order to operate the engine as the engineer. We consider it to be a correct principle that when a railroad provides food for its employees and they are using the facilities so provided to prepare themselves for their work

or to rest and recuperate, they must be regarded as in its employ. — Easton v. D. L. & W. R. Co., 160 F2d 15 (CCA 2d 1947), cert. den. 332 U. S. 770, 68 S. Ct. 82 (1947); Virginia Ry. Co. v. Earle, 130 F2d 548 (CCA 4th, 1942); North Carolina R. Co. v. Zachary, 232 U. S. 248, 34 S. Ct. 305 (1914).

We consider that in going to the diner Stinson was acting within the line and scope of his employment. His next duty would be to return from the diner to the engine. However, as we have pointed out, there was no evidence as to what happened after he left the diner and we can only speculate as to what proximately caused Stinson's death and if it was in the course of his employment, there being no duty of Stinson to perform which we can infer that he was doing when he was struck by the movement of the train. Under all the evidence there was no duty on Cook to find out where Stinson was or to anticipate peril to him. Stinson had no duties to perform in between or along side the cars of the train, as was the situation in Atlanta & St. Andrews Bay Ry. Co. v. Bennett, supra, and Atlantic Coast Line Railroad Co. v. McKoy, supra, referred to above. — Alabama Great Southern R. Co. v. Davis, 246 Ala. 64, 18 So2d 737.

Consequently the evidence fails to show probative facts from which a jury could infer that when Stinson was run over by the train, he was where his duty required him to be. Since this is true, the evidence does not show that the negligence, if any, of the defendant proximately caused his death. — Brady v. Southern Railway Co., 320 U. S. 476, 88 L. Ed. 239; Reynolds v. Atlantic Coast Line R. Co., supra. In the last cited case the Supreme Court of the United States said:

12.

"A party claiming under the Act must in some adequate way establish negligence, and it must appear that such negligence was the proximate cause, in whole or in part, of the accident.

• • • • • • • • •

"In order to state a cause of action, it must be able to appear by proper averments [and, we interpolate, by proper proof] that the injury was the natural and probable consequence of the negligent or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

We conclude that the court was in error in refusing to give the affirmative charge as requested by the defendant in the lower court.

Reversed and remanded.

Livingston, C. J., Lawson and Merrill, JJ., concur.

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

6th *Div., No.* 736

Atlantic Coast Line Railroad Company, *Appellant*

vs.

Mildred S. Stinson, as Administratrix etc., *Appellee,*

From Jefferson *Circuit Court.*

The State of Alabama,
City and County of Montgomery,

I, J. Render Thomas, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing pages, numbered from one to twelve *inclusive, contain a full, true and correct copy of the opinion of said Supreme Court in the above stated case, as the same appears and remains of record and on file in this office.*

Witness, J. Render Thomas, Clerk of the Supreme Court of Alabama, this the 31st *day of*

March, *19* 55

J. Render Thomas

Clerk of the Supreme Court of Alabama

PUBLISHED OPINION.

ATLANTIC COAST LINE RAILROAD CO.

v.

MILDRED S. STINSON, as Adm'x.

6 Div. 736.

Supreme Court of Alabama.

March 31, 1955.

Rehearing Denied June 21, 1956.

STAKELY, Justice.

This is an action instituted against the Atlantic Coast Line Railroad Company under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., by Mildred S. Stinson, as administratrix of the estate of A. Bruce Stinson, deceased, to recover damages for his death. Liability is predicated upon the alleged negligence of the defendant in the operation of its railroad which allegedly caused the death of the deceased, while in its employment. Upon the trial there was a verdict for the plaintiff and a judgment rendered thereon. Motion for a new trial was overruled and hence this appeal.

As submitted to the jury the complaint as last amended consisted only of count 5. In substance it alleged that A. Bruce Stinson was an employee of the defendant railroad and was killed while acting within the line and scope of his employment and that the defendant railroad was engaged in interstate commerce at the time of the death of decedent. It was further alleged that the death of Stinson resulted from the negligence of one or more of the officers, agents or employees of the defendant, whose name and names are

unknown to the plaintiff, while acting within the line and scope of their employment in this to wit: that he or they so negligently operated the aforesaid railroad train of the defendant as to cause plaintiff's intestate to be run over, upon or against by the said railroad train and as a proximate result and consequence thereof plaintiff's intestate was killed.

The defendant filed a plea of the general issue in short by consent with leave to give in evidence any matter which would be admissible in evidence if well pleaded and with leave to the plaintiff to make like reply.

The proof shows that on August 6, 1951, the crew of Work Extra 1707 consisting of conductor L. B. Cloud, flagman C. C. Hayes, brakeman Joe Murphy, fireman W. F. Cook and engineer A. B. Stinson was called to duty at Montgomery, Alabama, to report to Ramer, Alabama, to handle a wrecker for a train that had been derailed. When Work Extra 1707 arrived at Ramer they took over the work train, received the usual work train orders and proceeded to the place of the derailment, which was between 2½ and 3 miles beyond Ramer. They arrived at the scene of the derailment at about 9:45 p. m. At this time Work Extra 1707 was made up of the following cars from the front to the rear:

1. Wrecker
2. Wrecker tank
3. Engine
4. Gondola car of ties
5. Gondola car of coal
6. Flat car or wheel car
7. Bunk car
8. Kitchen car
9. Living and dining car
10. Caboose.

Upon arrival at the scene of the derailment all cars were cut from the engine except the wrecker cars. The engine and the wrecker cars were then moved forward by Stinson, the engineer, about four car lengths, nearer the derailment and "spotted". After the engine of Work Extra 1707 had been "spotted" by Stinson as aforesaid, its fireman Wm. F. Cook, upon receiving permission from Stinson, left the engine to go to the wreck and "to look around".

At 10;15 another train, the Western Wrecker, consisting of a total of five cars, arrived at the western end of the derailed cars. On this train was a fireman named McClain.

When fireman Cook returned to Work Extra 1707 fireman McClain of the Western Wrecker was in the engine cab of Work Extra 1707 but Stinson was not. McClain told Cook that Stinson had been on the engine when he reached it and had asked him, (McClain) to look out for the engine "until Stinson or Cook returned".

There was proof that after Stinson had left his engine he went to the kitchen car of 1707 and ate a plate of food given him by the cook. He left the dining car, leaving his cap on a stool. Stinson did not return to his engine. He was never seen alive after having left the dining car. There was proof that at the time Stinson left the dining car the cars were standing still and they were not moved, according to conductor Cloud, until it was "right at 10:30". Other testimony shows that after rerailing the wrecked car there was a coupling movement to the rerailed car, a lowering of the boom on the wrecker, a coupling to the rest of the train and then that conductor Cloud, who watched this operation, walked back to the caboose at the rear of the train before the move actually started on his signal given from the rear end of the caboose.

Stinson was not found until about two or three hours later after he left the diner when W. C. Stripling, the engineer of Through Train 216, going towards Ramer after the track had been cleared, discovered Stinson's nude body

severed across the north rail of the track at a point something over three-fourths of a mile from where he had last been seen at the diner. The lower part of Stinson's body was between the rails with the feet angling down the hill toward the west. The upper part was outside the rail with the head turned downhill. The arms were pulled back to the shoulders, the hands were gripped and the body was naked except for the socks. His clothes were found "wadded up" about 150 feet from the body toward the derailment. There was evidence of blood on the tracks and scuff marks to indicate he was dragged the 150 feet from the clothes to where the body was found.

There was proof showing that fireman Cook in Stinson's absence in operating the engine made three separate back-up moves. First, after coupling to the rerailed hopper, he moved back two car lengths and stopped so that the boom of the wrecking derrick could be swung; second, he moved back the remaining two car lengths, separating the engine from the cut cars in order to couple; third, he moved back two and one-half to three miles to Ramer. This last move was made without incident at about ten miles per hour, the caboose being in the lead.

When the absence of Stinson was noted the train was inspected at Sprague which is a place on the railroad between Ramer and Montgomery. A lot of blood was found on the northeast wheel of the wheel car and a small amount of blood on the wheel next to it. Blood was also found on the body bolsters and truck bolsters of the same car. Portions of the stomach and lungs were found between the brackets of the wheel (a roll of metal cast into the inside of the wheel). There was no blood on the wheels of the caboose or of the other cars between it and the wheel car. So far as we can discover there is nothing in the record to show that any portion of the clothing of the deceased or any shred thereof was found beneath the wheel car or under any other part of the train.

The proof showed rules of the Atlantic Coast Line Railroad Company as follows:

As to Engineers (Enginemen)—Rule 972: "They must not leave their engines during a trip except in cases of necessity, and then the fireman or some other competent person must be left in charge of the engine."

Rule 973:—"They must not permit an unauthorized person to run the engine. They may permit the fireman to do so, but only under their immediate supervision."

As to Firemen. Rule 990:—"Firemen will report to the Trainmaster in all matters connected with the movement of trains and engines; to the Master Mechanic in all matters relating to motive power. They must comply with instructions of the Road Foreman of Engines and other Mechanical Department Officers. They must comply with instructions of the engineman (engineer) while on duty. At stations and yards they are under the jurisdiction of the Station Master or Road Master; within shop limits, of the Engine House Foreman."

Rule 994:—"They must remain on engines during switching operations, unless otherwise directed. They must take charge of the engine should the engineman be absent, and must not leave the engine during absence of engineman, nor permit any unauthorized person upon the engine. If engineman should become disabled they must stop the engine. They must not run an engine in the absence of the engineman unless, in an emergency, they are directed to do so by the conductor or some other person in authority."

In addition to the rules pertaining to the fireman and engineer, the following rules were shown.

"Rule 20:—The engine bell must be rung when an engine is about to move except in instances where the stop and start, either forward or backward, is momentary, and is a continuous switching move and while approaching and

passing public crossings at grade, while passing trains on an adjacent track, and when necessary to prevent accidents."

Rule 32:—"The unnecessary use of the horn, whistle or bell is prohibited."

Rule 108:—"In case of doubt or uncertainty, the safe course must be taken."

The fundamental question in the case is whether the court erred in refusing the affirmative charge requested in writing by the defendant.

In reviewing the court's refusal to give the affirmative charge in Atlantic Coast Line R. Co. v. McMoy, 261 Ala. 66, 73 So.2d 85, 90, this court said:

> "Error is predicated on the refusal of the court to give the general affirmative charge with hypothesis. It is well understood that actionable negligence may be established by circumstantial evidence. Atlantic Coast Line R. Co. v. Taylor, [260 Ala. 401] 71 So.2d 27; Atlanta & St. Andrews Bay Ry. Co. v. Burnett, 259 Ala. 688, 68 So. 2d 726; Lavender v. Kurn, 327 U.S. 645, 66 S. Ct. 740, 90 L.Ed. 916; Tennant v. Peoria & P. U. R. Co., 321 U.S. 29, 64 S. Ct. 409, 88 L.Ed. 520. Furthermore, where the affirmative charge was refused the defendant, the entire evidence must be viewed in its most favorable aspect to the plaintiff and where this is done and a reasonable inference may be drawn adverse to the party requesting the affirmative charge, such charge is properly refused. Atlantic Coast Line R. Co. v. Taylor, supra, and cases cited therein. * * *"

[1] Under the plain provisions of the Federal Employers' Liability Act the gist of the action is negligence on the part of the defendant which in whole or in part proximately caused the injury complained of. The plaintiff is required to present probative facts from which the negligence alleged

and the causal relation between the negligence and the injury complained of can be reasonably inferred before such issues may be submitted to the jury. Atlantic Coast Line Railroad Co. v. Barnes, 261 Ala. 496, 75 So.2d 91; Reynolds v. Atlantic Coast Line Railroad Co., 251 Ala. 27 36 So.2d 102, affirmed 336 U.S. 207, 69 S. Ct. 507, 93 L.Ed. 618; Lavender v. Kurn, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916; Tennant v. Peoria & P. U. R. Co., 321 U.S. 29, 64 S.Ct. 409, 88 L.Ed. 520; Atlantic Coast Line Railroad Co. v. McMoy, supra.

There are three cases strongly relied on by the appellee to which we wish to refer at this point. In Lavender v. Kurn, supra, the Supreme Court of the United States held that the case was a case for the jury, that actionable negligence may be established by circumstantial evidence and that where the jury returns a verdict on probative facts from which negligence which in whole or in part proximately caused the injury may reasonably be inferred, it is no answer to say that the jury's verdict involved speculation and conjecture. In Lavender v. Kurn, supra, it was shown that the decedent suffered the injuries from which he died at a place where his duties required him to be. The railroad contended that the decedent was murdered but the court held that where there was proof of probative facts from which it could be inferred that the negligence of the railroad in whole or in part proximately caused the death of the decedent, the court on appeal would not disturb the verdict on the theory that the jury speculated as to whether death was the result of negligence or grew out of some other cause.

This court as it was its duty to do followed the reasoning in the foregoing decision of the Supreme Court of the United States in Atlanta & St. Andrews Bay Ry. Co. v. Burnett, 259 Ala. 688, 68 So. 2d 726, and in Atlantic Coast Line Railroad Co. v. McMoy, supra, and held that since there was proof of probative facts from which the jury had a right to infer negligence of the defendant and that

the decedent was killed by the railroad at a place where his duties to the railroad required him to be, the court would not speculate as to whether at the time of his death he was doing his duty or engaging in something not pertaining to his duty. We call attention to the fact that both in Atlanta & St. Andrews Bay Ry. Co. v. Burnett, supra, and Atlantic Coast Line R. Co. v. McMoy, supra, the work of the decedent required him to work on the ground alongside of or between the cars of the defendant railroad.

[2, 3] As we read the present record, there appears to be a conflict in the evidence as to whether fireman Cook in running the engine abided by the rules of the company in making the movements to which we have referred, in the absence of the engineer and in his failure to ring the bell at each movement. Upon a careful consideration it is our view that the plaintiff was entitled to go to the jury on these issues, which means that there was sufficient evidence for the jury to find that there was negligence on the part of the Atlantic Coast Line Railroad Company. Violation of one of defendant's rules is evidence of negligence. Tennant v. Peoria & P. U. R. Co., supra; Tiller v. Atlantic Coast Line R. Co., 323 U.S. 574, 65 S.Ct. 421, 89 L.Ed. 465; Alabama Great Southern Railroad Co. v. Davis, 246 Ala. 64, 18 So.2d 737.

This brings us to what we regard as the vital question in the case. Did the negligence, if any, of the defendant railroad in whole or in part proximately result in the death of Stinson?

The proof shows that Stinson's nude body was found severed across the rail of the track about three-fourths of a mile from where he had last been seen alive over two hours before. All of his clothes except his socks which he had on were found "wadded up together" about 150 feet nearer to the place where he had last been seen alive than where his body was found. There were markings on the track indicating that something had been dragged between the place

where the nude body was and the clothing. There was no evidence, however, as to how the engineer got from the diner, the place where he was last seen alive, to the above spot about three-fourths of a mile away. There was no evidence as to what he was doing and had been doing in the meantime. There was no evidence as to how he became nude. There was no evidence that he was alive and on the track at the time any train movement approached and passed the point where his body was found.

[4] Can it be said that there was any evidence which showed that Stinson's body was found at a place where his duty required him to be, as was the situation in the cases cited above? The duties of Stinson required him to be on the engine in order to operate the engine as its engineer. We consider it to be a correct principle that when a railroad provides food for its employees and they are using the facilities so provided to prepare themselves for their work or to rest and recuperate, they must be regarded as in its employ.—Mostyn v. Delaware L. & W. R. Co., 2 Cir., 1947, 160 F.2d 15, certiorari denied 1947, 332 U.S. 770, 68 S.Ct. 82, 92 L. Ed. 355; Virginian Ry. Co. v. Early, 4 Cir., 1942, 130 F.2d 548; North Carolina R. Co. v. Zachary, 1914, 232 U.S. 248, 34 S.Ct. 305, 58 L.Ed. 591.

We consider that in going to the diner Stinson was acting within the line and scope of his employment. His next duty would be to return from the diner to the engine. However, as we have pointed out, there was no evidence as to what happened after he left the diner and we can only speculate as to what proximately caused Stinson's death and if it was in the course of his employment, there being no duty of Stinson to perform which we can infer that he was doing when he was struck by the movement of the train. Under all the evidence there was no duty on Cook to find out where Stinson was or to anticipate peril to him. Stinson had no duties to perform in between or alongside the cars of the train, as was the situation in Atlanta & St.

Andrews Bay Ry. Co. v. Burnett, supra, and Atlantic Coast Line Railroad Co. v. McMoy, supra, referred to above. Alabama Great Southern R. Co. v. Davis, 246 Ala. 64, 18 So.2d 737.

[5] Consequently the evidence fails to show probative facts from which a jury could infer that when Stinson was run over by the train, he was where his duty required him to be. Since this is true, the evidence does not show that the negligence, if any, of the defendant in whole or in part proximately caused his death. Brady v. Southern Railway Co., 320 U.S. 476, 64 S.Ct. 232, 88 L.Ed. 239; Reynolds v. Atlantic Coast Line R. Co., supra. In the last cited case this court said:

> "A party claiming under the Act must in some adequate way establish negligence, and it must appear that such negligence was the proximate cause, in whole or in part, of the accident.
>
> * * * * * *
>
> "In order to state a cause of action, it must be made to appear by proper averments [and, we interpolate, by proper proof] that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." [251 Ala. 27, 36 So.2d 104.]

We conclude that the court was in error in refusing to give the affirmative charge as requested by the defendant in the lower court.

Reversed and remanded.

LIVINGSTON, C. J., and LAWSON and MERRILL, JJ., concur.

OPINION ON SECOND APPEAL.

THE STATE OF ALABAMA

Judicial Department

THE SUPREME COURT OF ALABAMA

October Term, 1956-57

6 Div. 106

MILDRED S. STINSON, AS ADMINISTRATRIX, ETC.

v.

ATLANTIC COAST LINE RAILROAD COMPANY, A CORPORATION.

APPEAL FROM JEFFERSON CIRCUIT COURT.

MERRILL, *Justice.*

This is the second appeal in this cause. On the first trial in circuit court, judgment was entered in favor of plaintiff Stinson. On appeal, this court decided that the defendant, Atlantic Coast Line Railroad Company, was entitled to the affirmative charge, and the judgment was reversed and the cause remanded. *Atlantic Coast Line Railroad Co. v. Stinson*, 264 Ala. 522, 88 So. 2d 189. Under these circumstances, there being no final judgment, it was impossible to apply to the Supreme Court of the United States for a review of the decision of this court.

When the cause again came on for trial, the parties, by stipulation, submitted the cause to the jury on the identical pleadings, testimony, evidence and rulings of the court as on the original trial. The trial court properly gave the requested written affirmative charge for the defendant and plaintiff effected this appeal.

This court continues to hold that the affirmative charge was properly given, and that the judgment of the circuit court should be affirmed. For the sake of brevity, and to avoid the setting out of the orignal opinion verbatim, we hereby adopt the opinion in *Atlantic Coast Line Railroad Co. v. Stinson*, 264 Ala. 522, 88 So. 2d 189, as our opinion in the instant case.

We feel that we should correct the concurrences in our original opinion as listed in the printed reports. Upon original deliverance, Chief Justice Livingston, Justices Lawson and Merrill concurred in the opinion by Mr. Justice Stakely, as reported. On application for rehearing, Chief Justice Livingston was of the opinion that the application for rehearing ought to be granted. That necessitated the consideration of the opinion by the entire court. At that consultation, all the justices concurred except Chief Justice Livingston who dissented. The original record shows a notation of such dissent. This explanation is included only for the sake of accuracy.

The appellee in the instant cause has filed a motion to dismiss the appeal. We have carefully considered the grounds listed in the motion and those argued in brief, and we are of the opinion that in this particular case, they are not sufficient to warrant the dismissal of the appeal. Motion overruled.

Affirmed.

All the Justices concur, except Livingston, C. J., who dissents.

FINAL JUDGMENT.

THE SUPREME COURT OF ALABAMA

Thursday, June 20, 1957

The Court Met Pursuant to Adjournment

Present: Chief Justice Livingston and Associate Justices Lawson, Simpson, Stakely, Goodwyn, Merrill and Coleman.

6 Div. 106

MILDRED S. STINSON, AS ADMINISTRATRIX OF THE ESTATE OF A. BRUCE STINSON, DECEASED, SUING AS SUCH ADMINISTRATRIX,

v.

ATLANTIC COAST LINE RAILROAD COMPANY, A CORPORATION.

JEFFERSON CIRCUIT COURT.

No. 27471-X.

Come the parties by attorneys, and appellee's motion to dismiss the appeal, and the record and matters therein assigned for errors, being submitted on briefs and duly examined and understood by the Court, it is considered that appellee's motion to dismiss the appeal be and the same is hereby overruled.

IT IS FURTHER CONSIDERED that in the record and proceedings of the Circuit Court there is no error.

IT IS THEREFORE CONSIDERED, ORDERED, AND ADJUDGED, that the judgment of the Circuit Court be and the same is hereby in all things affirmed.

It Is Also Considered, Ordered, and Adjudged, that the appellant Mildred S. Stinson, as Administratrix of the Estate of A. Bruce Stinson, Deceased, and E. A. Jones and N. F. Jones, sureties on the appeal bond, pay the costs of appeal of this Court and of the Circuit Court.

And it appearing that said parties have waived their rights of exemption under the laws of Alabama, let execution issue accordingly.

CERTIFICATE.

THE STATE OF ALABAMA
Judicial Department
THE SUPREME COURT OF ALABAMA
October Term 1956-57

6 Div. 106.

MILDRED S. STINSON,
AS ADMINISTRATRIX, ETC.,

v.

ATLANTIC COAST LINE RAILROAD COMPANY,
A CORPORATION,

JEFFERSON CIRCUIT COURT,
No. 27471-X.

THE STATE OF ALABAMA,
CITY AND COUNTY OF MONTGOMERY,

I, J. Render Thomas, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing pages lettered A and B and numbered from 1 to 326, inclusive, contain a full, true and correct copy of the record and proceedings, and of the opinion, of said Supreme Court of Alabama in the above stated cause [except the Exhibits incapable of being included, which can be certified to the Clerk upon request of either party], as the same appear and remain of record on file in this office.

WITNESS, J. Render Thomas, Clerk of the Supreme Court of Alabama and the Seal of the Court attached at the Judicial Department Building in the City of Montgomery, this the 31st day of July, 1957.

J. RENDER THOMAS,
Clerk of the Supreme Court of Alabama.

Office-Supreme Court, U.S.
FILED
OCT 14 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957.

No. 442.

MILDRED S. STINSON, as Administratrix of the Estate of A. BRUCE STINSON, Deceased, Suing as Such Administratrix,

Petitioner,

v.

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF.

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IN THE

Supreme Court of the United States.

October Term, 1957

No. 442

MILDRED S. STINSON, AS ADMINISTRATRIX OF THE ESTATE OF A. BRUCE STINSON, DECEASED, SUING AS SUCH ADMINISTRATRIX,

Petitioner

v.

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF.

This brief is submitted in reply to respondent's brief in opposition to the Petition for Writ of Certiorari.

ARGUMENT.

I.

The Petition Is Factually Accurate.

The opening of respondent's brief in opposition states that we "represent to this Court as material basis for action by it, that the Supreme Court of Alabama deviously connived at tampering with its own opinions and records. These imputations recklessly disregard and misrepresent record facts. We can only assume that Petitioner chose not to file with this Court certain portions of the Record

of the Supreme Court of Alabama," (respondent's brief, p. 2).

We made it abundantly clear in the Petition, which respondent has studiously avoided, that the unexplained circumstances surrounding the change in the opinion have utterly nothing to do with the basis for the Petition. Our "Reasons for Granting the Writ" (Petition, pp. 9-11) assert the only grounds on which we rely. There is utterly no mention of the change in the opinion there. Those circumstances, which we described with scrupulous accuracy, were discussed because they provide the context for the unavoidable fact that the Petition had to treat two—not one—opinions. We stated this at the very outset of the Petition (p. 16).

We made no "unctuous representations that the Supreme Court of Alabama and its Clerk connived at falsifying its records" (respondent's brief, p. 14). We stated cold facts and nothing more. It is a fact that the opinion was changed. It is a fact that counsel received no notice of the change. It is a fact that no explanation for the change was ever given. It is a fact that the changes that were made left an internal inconsistency in the altered opinion (See Petition, p. 21).

The inferences to be drawn from these bizarre circumstances are a matter of utter indifference to us. They are absolutely unrelated to the reasons for granting the Writ. To the extent that any value judgments have been drawn from them, they were drawn by respondent not us.

We took only one liberty with these facts, and it was to make only those assumptions which exhaust the possibilities of just what the altered opinion could mean (Petition, p. 21). It has not been suggested, nor could it be, that we were anything but fair in making these assumptions.

Insofar as respondent assumes that "Petitioner chose not to file with this Court certain portions of the Record of the Supreme Court of Alabama", it is in stark error

(respondent's brief, p. 2). We did not choose any portions of the record. We requested that the Clerk of the Supreme Court of Alabama forward the *entire record and transcript* in the case for filing in this Court in connection with the Petition for Certiorari. The Clerk certified that he had done so (29a). We could do nothing more.

II.

Respondent's Jurisdictional Argument Is Legally and Factually Without Merit.

On the first appeal in this case, the Alabama Supreme Court "reversed and remanded" on March 31, 1955 and denied a rehearing on June 21, 1956 (12a, 15a). Under the law and the practice of Alabama, that order was not a final judgment. On the contrary, the ". . . reversal of a judgment restores the parties to the condition in which they stood before it was rendered. . . ." *Jackson S. & Inv. Co. v. A. Paul Gooddall R. E., Etc. Co.*, 28 Ala. 339, 340, 184 So. 344, 345 (1938). This perforce means a new trial.

In *Gospel Army v. City of Los Angeles*, 331 U. S. 543, 67 S. Ct. 1428 (1947), the Supreme Court of California entered an unqualified reversal which was effective to remand the case for a new trial and place the parties in the same position as if the case had never been tried. This Court held that no appeal from the Supreme Court would lie. The analogy between the case at bar and *Gospel Army* is exact.

Indeed this Court has repeatedly asserted that the grant of a new trial is not a final judgment. *United States v. Denver & Rio Grande Railroad Co.*, 191 U. S. 84, 93, 24 S. Ct. 33, 36 (1903); *Urie v. Thompson*, 337 U. S. 163, 171, 69 S. Ct. 1018, 1025 (1949).

On the second appeal, the Supreme Court of Alabama recognized: (1) that its original order merely granted a new trial; (2) that the original order was not a final judgment; and (3) that under the decisions of this Court,

review of that original order could not have been properly sought. The court said (25a):

> "* * * On appeal, this court decided that the defendant, Atlantic Coast Line Railroad Company, was entitled to the affirmative charge, and the judgment was reversed and the cause remanded. *Atlantic Coast Line Railroad Co. v. Stinson*, 264 Ala. 522, 88 So. 2d 189. Under these circumstances, there being no final judgment, it was impossible to apply to the Supreme Court of the United States for a review of the decision of this court."

Having so recognized the non-finality of this original order of reversal and remand, the Alabama Supreme Court for the first time entered a final judgment (27a-28a). No such final judgment was, or could have been, entered upon the reversal and remand.

In the face of this formidable body of established law, the respondent now seeks to transform the non-final order into a final judgment, and the final judgment into an irrelevancy. The alchemy for this transmutation consists of: (1) inferentially misleading statements in its brief combined with a curious *post hoc* reasoning; and (2) the citation and quotation (out of context) of cases that are totally unrelated to the present situation.

1. On November 13, 1956, the day of decision arrived when petitioner's case came on for re-trial. From June 21, 1956 (the denial of re-hearing) until November, no witness had appeared and no evidence had been discovered. It was petitioner's view during those months that additional witnesses or evidence would not be discovered. On the day of trial she was inevitably compelled to concede of record that no evidence different from or in addition to that of the original trial would be forthcoming. Then,—and then only,—petitioner, pursuant to stipulation of counsel,

offered the previous record in evidence as her case.

The statements on page 16 of respondent's brief imply that this was the situation on June 21, 1956. In retrospect, it was. But no one could have known that with certainty on June 21, 1956. No one could have known it with absolute certainty until the very day of re-trial. Respondent, however, relates the final situation of November 13, 1956, back to the equivocal and uncertain situation of June 21. Having done so, respondent says, in effect, that because it eventually turned out in November that we had no more evidence, we should have stated with finality in June that which we could not know with finality until November. Having demanded the impossible of us, respondent concludes that the June order was final.

Respondent (brief, page 17) attempts to analogize this situation with that of *Pope et al. v. Atlantic Coast Line R. Co.*, 345 U. S. 379, 73 S. Ct. 749 (1953). The two cases are totally dissimilar. In *Pope*, the respondent had sued in the state court to enjoin petitioner from suing in Georgia. Petitioner demurred and the lower court sustained the demurrer. The Georgia Supreme Court reversed and overruled the demurrer. This Court granted certiorari, but ordered argument on the question of finality. Petitioner agreed to the facts and conceded that he was relying only on his legal defense to the complaint, i. e., that the Georgia court had no legal power to enjoin the suit in Georgia under the F. E. L. A. There was no possibility of any factual determination in the trial court.

Here the case was sent back after the first appeal for the further production of evidence and a factual determination by a jury. The petitioner in *Pope* knew upon remand that the issue was purely legal. Here, the issue on remand was factual with no possibility of reaching an agreed state of facts.[1]

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1 Compare petitioner's and respondent's respective Statements of the Case here.

We have pointed out, *supra*, that this Court and the Alabama courts are clear that the grant of a new trial by reversal and remand is not a final judgment. So warned, we have carefully heeded the plain admonition contained in this Court's ruling upon an identical order of this same Alabama court. In *Davis Admrx. v. Alabama Great Southern Railroad Company*, 324 U. S. 846, 65 S. Ct. 676 (1945), in an F. E. L. A. case, the Alabama court held, as it did here, that the affirmative charge should have been given. It ordered, precisely as it did here, that the case be "reversed and remanded". Petitioner immediately sought certiorari, as respondent would have had us do here.[2] This Court said:

> "* * * Petition for writ of certiorari to the Supreme Court of Alabama denied for the reason that it does not appear from the record or from the papers submitted that the judgment is final."

Respondent attempts, vainly, to distinguish this case (brief, p. 21) stating that in *Davis* "it was not established as it is here that *upon rendition of the judgment and opinion in question* Petitioner was unable to produce any other, different or additional evidence on any further trial". It is sufficient to say that here petitioner's inability to produce additional or different evidence was conclusively established both in fact and on the record on the trial date of November 13, 1956, and not before. It was not established "upon rendition of the judgment" on June 21, 1956 as respondent would have the Court believe.

At the time of the denial of rehearing in June, 1956, the most that we could have said with propriety was that "we have no further or additional evidence *at this time*".

It is at least doubtful that where factual issues are at stake on remand, such a qualified statement by counsel

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2. We have no doubt that had we done so, respondent would have argued that "there was no final judgment."

can vest jurisdiction in this Court. No case says so, and an attempt to do it would have been a voyage on uncharted seas. We followed the course laid down by this Court. We know of no doctrine which bars relief to litigants who seek it by routes designated by our courts.

2. The cases cited by respondent in support of its argument do not, upon analysis, substantiate it.

First. Of course, where a state appellate court directs what judgment is to be entered and leaves nothing to be done by the lower court but the ministerial act of entering that judgment, then the appellate judgment has finality. This was the only issue in these cases cited by respondent: *Rio Grande Western Railway Company v. Stringham et al.*, 239 U. S. 44, 36 S. Ct. 5 (1915); *Department of Banking v. Pink*, 317 U. S. 264, 63 S. Ct. 233 (1942); *Cole v. Violette et al.*, 319 U. S. 581, 63 S. Ct. 1204 (1943).

A new trial is not a ministerial act. In *Gospel Army v. City of Los Angeles*, 331 U. S. 543, 67 S. Ct. 1428 (1947), this Court said, at page 546 (67 S. Ct. p. 1430):

> "Under § 237 of the Judicial Code, 28 U. S. C. § 344, 28 U. S. C. A. § 344, only 'final judgments' of state courts may be appealed to this Court. And it frequently has been said that for a judgment of an appellate court to be final and reviewable for this purpose it must end the litigation by fully determining the rights of the parties, so that nothing remains to be done by the trial court 'except the ministerial act of entering the judgment which the appellate court * * * directed.' Department of Banking, State of Nebraska, v. Pink, 317 U. S. 264, 267, 63 S. Ct. 233, 235, 87 L. Ed. 254. Thus, where the effect of the state court's direction is to grant a new trial, the judgment will not be final."

Second. *In Market St. Ry. Co. v. Railroad Commission of State of California et al.*, 324 U. S. 548, 65 S. Ct.

770 (1945), the holding of the Court was that ". . . finality is not deferred by the existence of a latent power in the rendering court to reopen or revise its judgment" (324 U. S. p. 551, 65 S. Ct. p. 773). The question decided there has absolutely no relevance to this case.

Third. In *Richfield Oil Corp. v. State Board of Equalization*, 329 U. S. 69, 67 S. Ct. 156 (1946), an appeal was taken to the Supreme Court of California on facts which had been stipulated and the Supreme Court of California reversed the trial court. We need do no more than refer to this Court's distinction of *Richfield* from the situation here.

In *Gospel Army v. City of Los Angeles*, 331 U. S. 543, 67 S. Ct. 1428 (1947), *supra*, this Court said, at page 547 (67 S. Ct. 1430):

> "Thus, this term in Richfield Oil Corporation v. State Board of Equalization, *supra*, despite the fact that the Supreme Court of California had reversed a judgment without directions, we determined on the entire record and upon an independent investigation of California law that the judgment was final for the purposes of § 237. In the first place, the facts had been stipulated and, so far as appeared, the stipulation would have been available and controlling upon a second trial. In the second place, the suit was one for a refund of a tax and under California law only those grounds presented in the prior claim for refund could be urged in the suit. The opinion stated: 'Since the facts have been stipulated and the Supreme Court of California has passed on the issues which control the litigation, we take it that there is nothing more to be decided.' 329 U. S. at pages 73, 74, 67 S. Ct. at page 159.
>
> "In this case, however, the facts have not been stipulated, nor are there any special procedural restrictions. Thus, under California law, the Gospel

Army on the second trial to which it is entitled may amend its complaint and present new facts. * * *"

There is one final crushing fact of record. It destroys respondent's whole specious legal argument on jurisdiction.

On November 13, 1956 at the second trial of this case, counsel for both parties entered into the only stipulation in this entire record. Respondent's whole brief has significantly kept away from those portions of the stipulation which unseat its whole position.

This was the pertinent provision to which both parties bound themselves in formal judicial proceedings:

> "4. That the said action resulted in a verdict for the plaintiff which, on appeal to the Supreme Court of Alabama, was reversed and remanded for a new trial, without entry of a final judgment." (R.28-29)

This provision speaks with a clarity that could not be more exact: (1) *there was no final judgment on the first appeal* and (2) *the Supreme Court of Alabama reversed and remanded for a new trial.* Respondent has with finality spread both of those concessions upon this record. Its massive failure of candor with this Court is manifest when its jurisdictional argument is tested by this record stipulation.

This is not all. Respondent not only has agreed that there was no final judgment on the first appeal, but it further stipulated in the same judicial proceeding:

> "10. That neither party shall be deemed to have waived hereby the right to appeal any action of the trial court based upon this stipulation, and that neither party shall be deemed to have waived hereby the right to file a petition for a Writ of Certiorari with the Supreme Court of the United States." (R.29-30)

This stipulation is diametrically opposed to just that jurisdictional argument respondent now strains to impose upon the substantial merits of the Petition: that we have waived our right to petition for the Writ by not proceeding here after the decision in the first appeal which respondent concedes of record was not final.

We leave to the respondent the irrelevant task of drawing whatever value judgments it wishes from this behavior.

Respondent's silence concerning its record concession and argument is not overly strange. The reason for that silence is undoubtedly the fact that it has no answer.

Its comparative silence on the merits is explainable on the same basis.

CONCLUSION.

This is fundamentally an uncomplicated case. It presents an eminently reviewable question for all the substantial reasons expressed in the Petition.

We have dealt accurately with the facts and circumstances surrounding this issue. We have exhaustively briefed controlling law. In contrast respondent has unfortunately seen fit to mask the substantial issue in a jurisdictional argument as to finality that is legally untenable and doubly so when tested by the record fact that respondent has irrevocably conceded the very truth that it now wants this Court to believe is not the truth: that there was no final judgment on the first appeal. As to the merits, respondent has remained significantly silent.

We seek here simple and final relief. This cause presented a jury question which a jury resolved in petitioner's favor. A mere naked reversal by this Court would result only in a third trial, which would give respondent precisely what it sought and erroneously obtained in the Alabama Supreme Court.

This Court has effectively scotched respondent's contention (brief, p. 15) that it can review only the second appeal. As long ago as *United States v. Denver & Rio Grande Railroad Company*, 191 U. S. 84, 24 S. Ct. 33 (1903), where the case, as here, had been twice before the state appellate court, this Court said (191 U. S. p. 93. 24 S. Ct. p. 35):

> "While the supreme court of New Mexico upon this second writ of error may have considered itself bound by its decision upon the question here involved upon the first writ as the law of the case, we are not ourselves restrained by the same limitation. As its judgment upon the first writ was merely for a reversal of the court below, and for a new trial, such judgment, not being final, could not be made the subject of a writ of error from this court. Upon the present writ, however, we are at liberty to revise the action of the court below in both instances."

And as late as *Urie v. Thompson*, 337 U. S. 163, 69 S. Ct. 1018 (1949), where again there had been two appeals to the state supreme court, the Court said, at page 172 (69 S. Ct. p. 1026):

> "* * * Local rules of practice cannot bar this Court's independent consideration of all substantial federal questions actually determined in earlier stages of the litigation by the court whose final adjudication is brought here for review. * * *"

This Court there reinstated plaintiff's verdict.

We respectfully submit it is time this litigation ended. This Court has the power to direct reinstatement of the original judgment for petitioner. See Petition, p. 29. We ask that the Petition be granted and that the judgment of the Supreme Court of Alabama be reversed with directions to enter judgment for the plaintiff in the amount of

$46,600.00 together with such costs, interest and penalties as have accrued under Alabama law.

Respectfully submitted,

JOSEPH S. LORD III,
CHARLES A. LORD,
SEYMOUR I. TOLL,
Counsel for Petitioner.

RICHTER, LORD & LEVY,
Of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1957.

No. 442.

MILDRED S. STINSON, as Administratrix of the Estate of A. BRUCE STINSON, Deceased, Suing as Such Administratrix,

Petitioner,

v.

ATLANTIC COAST LINE RAILROAD COMPANY;

Respondent.

MOTION UNDER RULE 35 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES (JULY 1, 1954).

JOSEPH S. LORD, III,
CHARLES A. LORD,
SEYMOUR I. TOLL,
Counsel for Petitioner.

RICHTER, LORD & LEVY,
Of Counsel.

International, 711 So. 50th St., Phila. 43, Pa.

Supreme Court of the United States.

OCTOBER TERM, 1957.

No. 442.

MILDRED S. STINSON, AS ADMINISTRATRIX OF THE ESTATE OF A. BRUCE STINSON, DECEASED, SUING AS SUCH ADMINISTRATRIX,

Petitioner,

v.

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

MOTION UNDER RULE 35 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES (JULY 1, 1954).

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States.

The motion of Mildred S. Stinson, as Administratrix of the Estate of A. Bruce Stinson, deceased, suing as such Administratrix, by her attorneys, respectfully represents that:

1. On November 18, 1957, this Court entered its Order, per Curiam, granting a writ of certiorari to the Supreme Court of Alabama, reversing the judgment of that Court and remanding "* * * for consideration of any grounds not disposed of on the first appeal; and, if none has merit, with instructions to reinstate the judgment entered on the jury verdict of June 12, 1953, awarding the petitioner damages of $46,600.00. * * *"

2. The within action arises out of an accident on August 6, 1951, as a result of which petitioner's decedent was killed.

3. Said action was originally tried in June, 1953,—more than four years prior to the grant of the petition for certiorari here.

4. Following the original trial, three years elapsed until the first appeal was finally decided by the Supreme Court of Alabama on June 21, 1956. For two years and three months of that time the case was pending before said Court. From June 21, 1956, until the second trial, five months elapsed and from then until the final decision on the second appeal seven more months elapsed.

5. On the original appeal to the Supreme Court of Alabama, that Court, although remanding for a new trial on the ground that the case should not have been submitted to the jury because of asserted insufficient evidence of proximate cause (a conclusion now reversed here), adverted to no other errors, nor did it reserve any asserted errors for later decision.

6. On the second appeal herein to the Supreme Court of Alabama, that Court said (App. to Petition for Writ of Certiorari, p. 25a):

> "* * * When the cause again came on for trial, the parties, by stipulation, submitted the cause to the jury on the *identical pleadings, testimony, evidence and rulings of the court as on the original trial.* The trial court properly gave the requested written affirmative charge for the defendant and plaintiff effected this appeal. * * *" (Emphasis added.)

7. Thus, the Supreme Court of Alabama had before it on the second appeal the same evidence and rulings that were before it on the first appeal.

8. The Final Judgment of the Supreme Court of Alabama, dated June 20, 1957 (App. to Petition for Writ of Certiorari, p. 27a), ordered:

> "* * * It Is Further Considered that in the *record and proceedings* of the Circuit Court *there is no error.*
>
> "It Is Therefore Considered, Ordered and Adjudged, that the judgment of the Circuit Court be and the same is hereby *in all things* affirmed. * * *" (Emphasis added.)

9. It is respectfully submitted that since there remain no grounds not considered on the first appeal, petitioner should not be subjected to any further delay and that this Court should now end the litigation since it is, on the face of the record, ended.

Wherefore, petitioner respectfully moves your Honorable Court to modify its order of November 18, 1957, by directing the entry of judgment for the petitioner upon the original verdict of $46,600.00.

Respectfully submitted,

Joseph S. Lord, III,
Charles A. Lord,
Seymour I. Toll,
Counsel for Petitioner.

Richter, Lord & Levy,
Of Counsel.

Certificate of Service.

I, Joseph S. Lord, III, one of the attorneys for Mildred S. Stinson, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on December 10, 1957, I served a full, true and correct copy of the foregoing Motion under Rule 35, by mailing, air mail, such copy in a duly addressed envelope with first class air mail postage prepaid to respondent's attorney of record, Peyton D. Bibb, Esquire, addressed as follows:

Peyton D. Bibb, Esquire;
1115 First National Bank Building,
Birmingham, Alabama,

and duly deposited the same in the United States mail box.

Joseph S. Lord, III,
Attorney for Mildred S. Stinson, Petitioner.

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FILED
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JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 442.

MILDRED S. STINSON, as Administratrix of the Estate of A. BRUCE STINSON, Deceased, Suing as Such Administratrix,
Petitioner,

v.

ATLANTIC COAST LINE RAILROAD COMPANY,
Respondent.

BRIEF

Of Respondent in Opposition to Petition for Writ of Certiorari to the Supreme Court of Alabama.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 442.

MILDRED S. STINSON, as Administratrix of the Estate of A. BRUCE STINSON, Deceased, Suing as Such Administratrix,
Petitioner,

v.

ATLANTIC COAST LINE RAILROAD COMPANY,
Respondent.

BRIEF

Of Respondent in Opposition to Petition for Writ of Certiorari to the Supreme Court of Alabama.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Respondent, Atlantic Coast Line Railroad Company, by its attorneys, respectfully requests and moves the Court that the Petition for a Writ of Certiorari to the Supreme Court of Alabama be dismissed or denied.

FOREWORD

The allegations of the Petition (Petition, pages 2, 8 [last sentence], 12, 16, 20-21) represent to this Court as material basis for action by it, that the Supreme Court of Alabama deviously connived at tampering with its own opinions and records. These imputations recklessly disregard and misrepresent record facts. We can only assume that Petitioner chose not to file with this Court certain portions of the Record of the Supreme Court of Alabama.

Accordingly, as provided by paragraph (6) of Rule 21 of this Court, Respondent has filed with the Clerk a duly certified copy of an additional portion of the record below, being page 44 of Docket 107 of the Supreme Court of Alabama. For convenience this document and its certification are photographically reproduced in the Appendix hereto (pages 29 to 33, inclusive). Suffice it here to say that regarding the rendition of the first opinion of the Supreme Court of Alabama, Atlantic Coast Line Railroad Co. v. Mildred S. Stinson, as Admx., as officially reported at 264 Alabama 522, 88 So. 2d 189, it shows, among other things, the following official record action:

> "November 23, 1954—Argued and Submitted.
>
> March 31, 1955—Reversed and Remanded.
>
> April 14, 1955—Application for Rehearing Filed by Appellee (Petitioner).
>
> April 14, 1955—Certificate of Recall Issued. Order, Stakely, J.
>
> April 20, 1955—Certificate and Opinion Returned Pursuant to Recall.
>
> * * * * * * *
>
> June 21, 1956—Application for Rehearing Overruled; No Opinion Written (Pages 7, 8, 10 and 11 rewritten to insert 'in whole or in part').

June 21, 1956—Certificate of Reversal and Copy of Opinion Returned to Clerk."

In absence of its availability to us, it is uncertain just what is the content of the record which Petitioner did file with the Clerk.[1] Respondent is therefore seriously handicapped in undertaking to answer accurately many of the statements of Petitioner. However, rather than burden the Court with a motion under paragraph (7) of Rule 21 that the record be printed in advance, we will undertake to answer as fully as we can with the material now available to us at this stage of the proceeding,[2] and as far as is contemplated or proper under paragraph (1) of Rule 24.

THE OPINION BELOW.

The opinion of the Supreme Court of Alabama, rendered June 20, 1957, upon entry of its judgment of that date affirming the judgment of the trial court in favor of Respondent, and which is the only judgment sought here to be reviewed (Petition, p. 2), is reported at ... Ala. ..., 96 So. 2d 305 (Adv. #3, August 15, 1957). That opinion, reproduced for convenience in the Appendix (pages 44 to 45) in pertinent part, states (p. 306 of 96 So. 2d):

"This court continues to hold that the affirmative charge was properly given, and that the judgment of the circuit court should be affirmed. For the sake of brevity, and to avoid the setting out of the original

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[1] The notice mailed to Respondent's counsel as required by the Rules describes it as "Certified copy of first trial and judgment of S. Ct. of Alabama. Certified copy of second trial and judgment of S. Ct. of Alabama."

[2] In doing so, references hereinafter made to the Record will be to pages of the record of the Trial Court as certified to the Supreme Court of Alabama on Petitioner's appeal from the judgment rendered November 13, 1956, in favor of Respondent and which judgment was affirmed June 20, 1957.

opinion verbatim, **we hereby adopt the opinion in Atlantic Coast Line Railroad Co. v. Stinson, 264 Ala. 522, 88 So. 2d 189, as our opinion in the instant case.**" (Emphasis added.)

The earlier published opinion there **adopted as theretofore published in 264 Ala. 522, 88 So. 2d 189,** is for convenience, reproduced in the Appendix (pages 34-43 et seq.).

The first opinion, released June 21, 1956, **had been published before the time of the second trial,** on November 13, 1956, was before the trial court in the trial (R. 31-32) and the opinion of the Supreme Court of Alabama **as so published** was applied by the trial court. Moreover, a full official certified copy of the final opinion had been in the trial court's file of this case since June 21, 1956 (Appendix, p. 29).

Notwithstanding the plain record facts, by such canted statements as "original opinion * * * filed March 31, 1955, and certified by the Clerk," "what **purports** to be the original opinion" in official reports, but which "contain curious and unexplained material differences from the certified copy furnished to counsel by the Court," etc., the Petition represents to this Court that the Supreme Court of Alabama and its Clerk have connived at tampering with the records. An imputation of some kind of fraud or deceit.

This notwithstanding the original manuscript opinion of March 31, 1955, and its accompanying certificate of reversal, **were recalled by that Court on Petitioner's application for rehearing** (Appendix, p. 29) in which **Petitioner expressly took exception to omission to use the phrase "in whole or in part"** (Petition, pp. 20-21) at various places in the original manuscript[3] and the **record**

[3] The recalled *manuscript opinion* itself showed no conceptual disregard either of the full scope of the Act or of the phrase "in whole or in part" for it expressly applied in summation of its hold-

docket entry of action on Petitioner's application for rehearing on June 21, 1956, shows the indicated manuscript pages then **rewritten by the Court** to insert, as applicable, the words "in whole or in part" (Appendix, p. 29 and certificate).

It is not the Supreme Court of Alabama who has practiced deceit.

JURISDICTION.

In the Petition (p. 2) jurisdiction of this Court is sought to be raised expressly and solely with regard to the judgment of the Supreme Court of Alabama entered June 20, 1957 (Petition, p. 2 and Appendix, p. 27a), which affirmed the judgment of the trial court in favor of Respondent. No other judgment or order of the Supreme Court of Alabama is set forth in the manner required by the statutes and the Rules of this Court.

Yet the averments and statements in the Petition show that neither the judgment of June 20, 1957, nor the judgment and mandate dated June 21, 1956, in express compliance with which the trial court entered judgment for Respondent (R. 31-32), are within the jurisdiction of this Court to review.

The Record and Petition expressly show that upon entry of the judgment and mandate of reversal on June 21, 1956, by the Supreme Court of Alabama, Petitioner was (R. 29),

> "unable to produce any testimony or evidence different from or in addition to the testimony and evidence produced, offered and admitted at the said trial of June 8, 1953, to June 12, 1953."

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ing (Petition, Appendix, p. 12a) the universally applicable doctrine "A party claiming under the Act must in some adequate way establish negligence *and it must appear that such negligence is the proximate cause, in whole or in part,* of the accident."

And the Petition also establishes (Petition, p. 4) that Petitioner thereupon

> "* * * had only a new trial **with no additional evidence** to offer. Petitioner returned to Jefferson County in November, 1956, and offered the previous record in evidence. **The trial court in obedience to the previous mandate of its Supreme Court directed a verdict for respondent.**" (Emphasis added.)

and further (Petition, p. 28):

> "**Petitioner, therefore, found herself in the intolerable situation of having no additional evidence and having to go through the artificiality of a new trial on precisely the same evidence, suffering a directed verdict and then taking an appeal, the result of which was a foregone conclusion.**" (Emphasis added.)

Upon this state of record facts, this Petition, filed September 9, 1957, properly presents no judgment or order within the jurisdiction of this Court to review. 28 U. S. C., Sec. 1257 (3); 28 U. S. C., Sec. 2101 (*c*).[4] It is too late.

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[4] Under such record circumstances, the order and mandate of the Supreme Court of Alabama of June 21, 1956, was final for the purposes of review by this Court, irrespective of whether it is ordinarily considered as "final" under local practice or however considered by counsel or parties. Pope v. Atlantic Coast Line Railroad Co., 345 U. S. 379, 97 L. ed. 1094; Rio Grande Western Ry. v. Stringham, 239 U. S. 44, 60 L. ed. 136; Department of Banking v. Pink, 317 U. S. 264, 87 L. ed. 254; Market Street Railway Co. v. Railroad Commission of the State of California, 324 U. S. 548, 89 L. ed. 1171; Richfield Oil Corp. v. State Board (Cal.), 329 U. S. 69, 91 L. ed. 80 (87); cf. Cole v. Violette, 319 U. S. 581, 87 L. ed. 1599.

QUESTIONS PRESENTED.

The Petition and record raise only the following questions at this time:

(A) Whether the Petition should be dismissed because of failure to "present with accuracy" the essential record facts (par. [4] of Rule 23) and misrepresentation to the Court of the record facts and action of the Supreme Court of Alabama, and, if not,

(B) Whether, under the facts and circumstances established, and conceded by Petitioner, the Petition is either timely or adequate to present for review any order or judgment of the Court below within the jurisdictional requirements of the statutes [28 U. S. C., Sec. 1257 (3); 28 U. S. C., Sec. 2101 (c)] as applied by the decisions of this Court.

(NOTE: In this posture of the case, no question regarding the merits or the soundness of the judgment of the Supreme Court of Alabama in this case is timely. Par. [1] of Rule 24. If the Court should ultimately conclude that it has or will exercise jurisdiction to review this cause, then Respondent will perform its duty and expects to exercise its right under Rule 41 to file its brief on the merits, appropriately presenting and dealing with any questions on the merits of the cause which may arise on the record then properly established and available as provided by Rules 26 and 36.)

STATEMENT OF THE CASE.

(a) **The Pleadings.**—

The Complaint consisted entirely of Count Five, as amended (R. 18-19, 23). After jurisdictional averments,

it sought to predicate liability upon the averment that at the described time and place and "while the deceased, A. Bruce Stinson, was acting within the line and scope of his employment by the defendant" an employee of the defendant "so negligently operated" a train that "as a proximate result and consequence thereof" Stinson was killed. This was denied by proper plea.

(b) **The Facts as Shown by the Evidence.**[5]

Because of various omissions, and some interlarded opinion, in the statement of the evidence in the Petition, summation of the evidence and material facts is deemed necessary.

Bruce Stinson, the decedent, was engineer in the relief crew of Work Extra 1707, which was called at Montgomery, Alabama, on the night of August 6, 1951 to report to Ramer, Alabama, to assist in clearing a derailment about 2½ to 3 miles from Ramer. The crew, consisting of engineer Stinson, conductor L. B. Cloud, flagman C. C. Hays, brakeman Joe Murphy and fireman C. C. Cook, reported to Ramer, received the usual work train orders, took over Work Extra 1707 and arrived at the scene of the derailment at about 9:45 P. M. (R. 120).

In going to the derailment from Ramer the derrick wrecker and wrecker tank were in front and being pushed

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[5] While, as stated under "Questions Presented," supra, no questions on the ultimate merits of the cause are not appropriate to be considered under the Rules (par. [1] of Rule 24 and Rule 41) and Respondent is not in position to and does not undertake herein to deal with any such issues on the merits as may hereafter appear if the Court should assume jurisdiction and the record is established and available (Rules 26 and 36). Respondent is unwilling to appear to acquiesce in the "Statement of the Facts" as contained in the Petition. By setting out this summation Respondent does not undertake here to deal with any possible ultimate questions on the merits.

by the engine; next behind the engine were several gondola cars and flat cars with various contents, and at the rear of the train were three "camp cars" including a kitchen car, and on the rear was a caboose.

The train was stopped near the derailed cars, the other cars were cut off behind the engine and it moved the wrecker three or four car lengths closer to the derailed cars and "spotted" it for work (R. 123). Fireman Cook, with Stinson's permission, got off the engine to "look around" a little (R. 171). In a little while fireman Cook came back to his engine and found Stinson had left it (R. 171, 175) and fireman Cook took up the engineer Stinson's position (R. 171) upon instructions left by Stinson for Cook with McLain, the fireman of the other wrecker assisting in the re-railing (R. 175). These instructions from Stinson to the fireman Cook were to "look out for the engine" (R. 176) and "to assume the duties of the engineer" while Stinson was gone (R. 189), which, under the practices and experience of Stinson and Cook, and other engineers, meant for Cook to operate the engine as needed (R. 184) including making the trip back to Ramer to switch out the derailed car after it was picked up (R. 185, 178-179).

Fireman Cook was required to obey instructions of the engineer (R. 141, 187).

After re-railing the car, which was at 10:30 P. M. as noted by the Trainmaster (R. 125); Fireman Cook, so acting as Engineer in keeping with Stinson's instructions, moved the engine and wrecker back from the car to align the boom (R. 132), then made a coupling with the re-railed car and then, under supervision of the conductor, recoupled the engine to the remainder of the train preparatory to switching out the re-railed car by backing up to the Ramer siding (R. 132). Just before so recoupling

to the train he blew a regular "back up" signal (R. 180). Conductor Cloud then walked beside the train to the caboose on the far end of the train, nearest to Ramer, and after getting on the rear platform gave a signal to move on back to Ramer (R. 181).

It was usual and customary for the fireman of such work trains to operate the engine in such re-railing and back-up movements to switch out cars (R. 133-134) and in the switching move to Ramer the fireman ran the engine in an efficient, ordinary and careful manner.

The evidence shows without dispute that the fireman's handling the engine on this move to switch out the re-railed car in the absence of the engineer was so usual and ordinary that there was no occasion or reason for the fireman to look for Stinson or to undertake to find out where he was (R. 178-179, 133-134).

When the Work Extra 1707 reached Ramer, conductor Cloud was advised that Stinson was not on the engine and searched the "camp cars" for him (R. 125) and found no trace of him (R. 125, 127) nor any indication that anything had happened to Stinson. The train then proceeded on back to the derailment.

With the train back at the derailment and about 11:30 p. m., with Stinson's absence being known, an intensive search was made of the area, the train, the right-of-way, and the tracks for a considerable distance to the rear of the train toward Ramer (R. 97-101, 116) and no trace of Stinson was found nor any indication that anything might have happened to him.

It was found, however, that **Stinson had been in the dining car, where he ate something, but had left the dining car ten to fifteen minutes before the back-up movement to Ramer** had started (R. 114-115). The cars were standing

still at that time. Stinson did not return to his post of duty on the engine and was not seen alive again after he left the diner.

About 1:30 A. M., the engineer of passing train No. 216, being alerted to look for Stinson, discovered his nude body nearly a mile from the derailment (R. 203-204) and toward Ramer.

Stinson's body was entirely nude, except for his socks (R. 200) and all his clothes were in "a wad—wadded up" about 150 feet from the body (R. 200). Stinson's body was severed about the chest athwart the north rail. There was no evidence of any other marks, injuries or abrasions on Stinson's body. In the 150-foot space between the ball of clothes and Stinson's body, **but nowhere else**, there was blood along the track and markings as if something had been dragged (R. 205-206). No markings were found in the vicinity where the train was when Stinson left the diner nor on the approximate three-quarters of a mile to where his clothes were found "wadded up."

There was no evidence, however, as to how the engineer got from the standing diner, the place where he was last seen alive, to this spot over three-fourths of a mile away. There was no evidence as to what he was doing or had been doing in the meantime. There was no evidence how or why he came to be nude. He was not seen on, about or in the vicinity of the train or work scene at any time after he left the standing diner 10 to 15 minutes before the train was backed. There was no evidence that he was alive on the track at the time any train movement approached and passed the point where his body was found.

Thereafter, intensive inspection of Work Extra 1707 at Sprague (the opposite direction from Ramer) disclosed blood and human flesh on the wheels of a car about in the middle of the train (R. 106) beginning principally with the

car's lead wheel towards Ramer on the north side (R. 108) and on toward the engine. There was no blood on the wheels of the caboose or the "three camp cars" next to it (R. 108-146).

The following additional operating rules of Respondent were introduced in evidence (R. 139-142):

As to Engineers (Enginemen)—**Rule 972**:

"They must not leave their engine during a trip except in cases of necessity, **and then the fireman or some other competent person must be left in charge of the engine.**" (Emphasis supplied.)

Rule 973:

"They must not permit an unauthorized person to run the engine. They may permit the fireman to do so, but only under their immediate supervision."

As to Firemen—**Rule 990**:

"Firemen will report to the Trainmaster in all matters connected with the movement of trains and engines; to the Master Mechanic in all matters relating to motive power.

"They must comply with instructions of the Road Foreman of Engines and other Mechanical Department Officers.

"**They must comply with instructions of the engineman** (engineer) **while on duty.**

"At stations and yards they are under the jurisdiction of the Station Master or Road Master; within shop limits, of the Engine House Foreman." (Emphasis supplied.)

and (R. 195):

"30. The engine bell must be rung when an engine is about to move **except in instances where the stop**

and start, either forward or backward, is momentary, and is a continuous switching move and while approaching and passing public crossings at grade, while passing through yards and stations, when passing trains on an adjacent track, and when necessary to prevent accidents."

and (R. 295):

"32. The unnecessary use of the horn, whistle or bell is prohibited."

ARGUMENT.

I. The Petition Should Be Dismissed for Material Misrepresentations and Misstatements.

Inherent in the processes of this Court is the requirement of forthrightness in efforts of litigants to evoke its discretionary jurisdiction.

A major basis for the requested review by this Court are unctuous representations that the Supreme Court of Alabama and its Clerk connived at falsifying its records [Petition, ps. 2, 8 (last sentence), 12 to 21] by material and surreptitious alterations of that Court's official opinion. The official docket entries of action by the Supreme Court of Alabama (Appendix, p. 29), which Petitioner neglected to file with their Court, show these representations to be wholly without foundation. They further show that the action complained of (insertion by the Court the phrase "in whole or in part" at additional places in the withdrawn original manuscript opinion of March 31, 1955) **was in response to Petitioner's own objection on application for rehearing** (Petition, p. 20-21). The entry of August 21, 1957 [Appendix, p. 31] indicates that Petitioner chose the portions of the record desired for filing with this Court.

The alleged facts stated in the Petition, in this respect, are refuted by the record. That is, except as to such knowledge as Petitioner's Counsel may have had. Of this we cannot say. It is possible that counsel did not trouble to read the Court's opinion or to read the record when choosing those portions he desired to file with this Court in an effort to evoke its action.

However, we take it that signing and filing Petition and record warrants that the official records concerned furnish

good support for the facts and issues alleged and urged as a basis for exercise of the jurisdiction and processes of this Court.

Respondent respectfully submits that because of such misrepresentations and also the clear failure "to present with accuracy" the essential facts (par. 14 of Rule 23) the Petition should be dismissed or denied.

II. The Petition Is Not Timely to Raise or to Invoke the Statutory Jurisdiction of This Court.

Upon basis of the facts and circumstances disclosed, the Petition is not timely.

The Petition, filed September 9, 1957, is formally directed to attempted review of the judgment of the Supreme Court of Alabama, dated June 20, 1957, its case No. 106 (Petition, p. 2, and its Appendix, p. 27a), which affirmed the judgment of the trial Court in favor of Respondent (R. 23). If that judgment should be subject to review at all, it is obvious that the ultimate reach of success Petitioner could expect to obtain would be a possible reversal of judgment of the Supreme Court of Alabama affirming the judgment in favor of Respondent for further consistent proceedings —which could entail, at most, setting aside the trial court's judgment of November 13, 1956, in favor of Respondent and according to Petitioner another trial in the trial court.

But, oddly enough, it soon appears that the Petition, sliding to another tack, attempts to review **another** judgment—the judgment of the Supreme Court of Alabama entered June 21, 1956 (its case No. 736 on a prior separate appeal), annulling the previous action of the trial court and remanding the cause to the trial court. While in the record of the Supreme Court of Alabama concerning its judgment of June 20, 1957, affirming the action of the trial court, there appears no prior verdict or judgment in favor of Petitioner, because the proceedings in the trial court

showed there had previously been "a verdict" and judgment for Petitioner (R. 28), which had been annulled and set aside, and Petitioner stated that the amount of the annulled verdict was $46,600 (R. 30). Petitioner now wants a judgment for that amount entered here.

A bootstrap effort at recovery by ipse dixit.

But, more important, the Petition clearly shows that, for purposes of jurisdiction of this Court on review, under the applicable statutes and decisions, the judgment of reversal entered by the Supreme Court of Alabama on June 21, 1956, was a final judgment, effectively and finally determined Petitioner's asserted federal rights under the established facts and no review is now within the statutory jurisdiction of this Court [28 U. S. C., Sec. 1257 (3); 28 U. S. C., Sec. 2101 (c)].

Of the effect of the status of affairs obtaining after entry of the judgment of reversal entered June 21, 1956, the Record shows (R. 29) that Petitioner was

> "unable to produce any testimony or evidence different from or in addition to the testimony and evidence produced, offered and admitted at the said trial of June 8, 1953, to June 12, 1953."

The Petition (Petition, p. 4) further establishes that thereupon Petitioner

> "* * * had only a new trial **with no additional evidence** to offer. Petitioner returned to Jefferson County in November, 1956, and offered the previous record in evidence. **The trial court, in obedience to the previous mandate of its Supreme Court, directed a verdict for respondents.**" (Emphasis added.)

And further (Petition, p. 28):

> "**Petitioner, therefore, found herself in the intolerable situation of having no additional evidence and having to go through the artificiality of a new trial**

> **on precisely the same evidence, suffering a directed verdict and then taking an appeal, the result of which was a foregone conclusion.''** (Emphasis added.)

The question of finality is determined by this Court under the facts and circumstances before it, irrespective of characterizations in state practice, the views of state courts or the opinions of the parties. In Pope v. Atlantic Coast Line Railroad Company, 345 U. S. 379, 97 L. ed. 1094, this Court aptly held:

> ''Yet we are not bound to determine the presence or absence of finality from a mere examination of the 'face of the judgment.' We have not interpreted Section 1257 so as to preclude review of federal questions which are in fact ripe for adjudication when tested against the policy of Section 1257.
>
> ''The finality problem arises in this case because the judgment of the Georgia Supreme Court did not, on its face, end the litigation. **Both parties agree that Georgia procedure would permit petitioner to return to the Superior Court of Ben Hill County and interpose some other defense to respondent's suit for an injunction. But petitioner has no other defense to interpose. He has been both explicit and free with his concession that his case rests upon his federal claim and nothing more.** If the court below decided that claim correctly, then nothing remains to be done but the mechanical entry of judgment by the trial court. Thus, as the case comes to us, the federal question is the controlling question: 'there is nothing more to be decided.' Under these particular circumstances, we have jurisdiction over the cause. Richfield Oil Corp. v. State Board of Equalization, 329 U. S. 69, 91 L. ed. 80, 67 S. Ct. 156 (1946).'' (Emphasis added.)

And again in Richfield Oil Corp. v. State Board (Calif.), 329 U. S. 69, 91 L. ed. 80 (87), this Court held:

"The designation given the judgment by state practice is not controlling. Department of Banking v. Pink, 317 U. S. 264, 268, 87 L. ed. 254, 257, 63 S. Ct. 233. The question is whether it can be said that 'there is nothing more to be decided' (Clark v. Williard, 292 U. S. 112, 118, 78 L. ed. 1160, 1164, 54 S. Ct. 615), that there has been 'an effective determination of the litigation.' Market Street R. Co. v. Railroad Commission, 324 U. S. 548, 551, 89 L. ed. 1171, 1175, 65 S. Ct. 770; see Radio Station WOW v. Johnson, 326 U. S. 120, 123, 124, 89 L. ed. 2092, 2096, 2097, 65 S. Ct. 1475."

And further regarding elements and determination of "finality," in Market Street Railway Company v. Railroad Commission of the State of California, 324 U. S. 548, 89 L. ed. 1171, the Court held:

"We have held that finality of a judgment of a state court for determining the time within which our jurisdiction to review may be invoked is not controlled by the designation applied in state practice. Department of Banking v. Pink, 317 U. S. 264, 87 L. ed. 254, 63 S. Ct. 233; Cole v. Violette, 319 U. S. 581, 87 L. ed. 1599, 63 S. Ct. 1204. The judgment for our purposes is final when the issues are adjudged. Such finality is not deferred by the existence of a latent power in the rendering court to reopen or revise its judgment. The waiting period prescribed by the statute here seems to reserve a power of that character."

The situation is analogous to the attempt made in Rio Grande Western Railway Company v. Stringham, 239 U. S. 44, 60 L. ed. 136, where on certiorari directed to a **second judgment** of the Utah Supreme Court, affirming the trial court's entry of judgment in keeping with an earlier reversal, an attempt was made to review the **first judgment** of the Utah court which reversed the trial court, this Court held:

"Manifestly the first judgment was final within the meaning of Judicial Code, Section 237 (36 Stat. at L. 1156, chap. 231, Comp. Stat. 1913, Section 1214). It disposed of the whole case on the merits, directed what judgment should be entered, and left nothing to the judicial discretion of the trial court: Tippecanoe County v. Lucas, 93 U. S. 108, 23 L. ed. 822; Bostwick v. Brinkerhoff, 106 U. S. 3, 27 L. ed. 73, 1 Sup. Ct. Rep. 15; Mower v. Fletcher, 114 U. S. 127, 29 L. ed. 117, 5 Sup. Ct. Rep. 709; Chesapeake & P. Telep. Co. v. Manning, 186 U. S. 238, 46 L. ed. 1144, 22 Sup. Ct. Rep. 881. And as the question sought to be presented arises upon the first judgment—it being final in the sense of Section 237—it is apparent that the writ of error addressed to the second judgment presents nothing reviewable here."

Attention is also invited to Department of Banking v. Pink, 317 U. S. 264, 87 L. ed. 254, and the following observations there made:

"For the purpose of the finality which is prerequisite to a review in this Court, the test is not whether under local rules of practice the judgment is denominated final (Wick v. Superior Ct., 278 U. S. 575, 73 L. ed. 515, 49 S. Ct. 94; Cheltenham & A. Sewerage Co. v. Pennsylvania Pub. Utility Commission, No. 160, decided October 12, 1942, 317 U. S. 588, post 482, 63 S. Ct. 38), but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights, and that that adjudication is not subject to further review by a state court. (See Gorman v. Washington University, 316 U. S. 98, 86 L. ed. 1300, 62 S. Ct. 962.) Where the order or judgment is final in this sense the time for applying to this Court runs from the date of the appellate court's order, since the object of the statute is to limit the applicant's time to three months from the date when the finality of the judgment for purposes of review is established."

It thus clearly appears from the record facts and statements and concessions freely made by Petitioner that, after entry of the judgment of the Supreme Court of Alabama on June 21, 1956, there were no other facts, evidence or claims to present to any court, that such rights as she claimed under the F. E. L. A. were fully determined by it and nothing remained save the formality of entry of judgment in the trial court in conformity with it. That judgment is therefore shown to have been "final" within the orbit of review by this Court and was subject to review, if at all, upon a petition filed within ninety days from June 21, 1956, but not otherwise (28 U. S. C., sec. 1257).

Here compare Cole v. Violette et al., 319 U. S. 581, 87 L. ed. 1599 (1600), where the Court held:

> "Massachusetts local practice regards the decree entered by the Superior Court on the rescript, rather than the order of the Supreme Judicial Court contained in the rescript, as the 'final decree' in the case. See Boston v. Santosuosso, 308 Mass. 189, 194, 31 N. E. (2d) 564; Carilli v. Hersey, 303 Mass. 82, 84, 20 N. E. (2d) 492. But in determining what is a final judgment or decree within the meaning of par. 237 of the Judicial Code, 28 USCA, par. 344, 8 FCA, title 28, par. 344, we are not controlled by the designation applied to it in state practice. Department of Banking v. Pink, 317 U. S. 264, 268, ante, 254, 257, 63 S. Ct. 233. Gorman v. Washington University, 316 U. S. 98, 101, 86 L. ed. 1300, 1302, 62 S. Ct. 962. The order of the Supreme Judicial Court of Massachusetts incorporated in its rescript, was an order of the same nature and with the same incidents as those of the highest courts of other states which we review. It was an order of the court, and one which finally disposed of all the issues in the case, leaving nothing to be done but the ministerial act of entering judgment in the trial court. The appeal is dismissed on the ground that it was

not applied for within the time provided by law. Department of Banking v. Pink, supra, and Matton S. B. Co. v. Murphy, 319 U. S. 412, ante, 1483, 63 S. Ct. 1126, supra."

In any event, the judgment of the Supreme Court of Alabama entered June 21, 1956 (Appendix, p. 29, docket entry), on the first appeal annulling the judgment of the trial court passed out of the power and jurisdiction of the Supreme Court of Alabama upon entry or, at most, after 15 days. Rule 34, "Rules of Practice", Alabama Supreme Court, Sec. 13, Title 17, Code of Alabama 1940. No question regarding that judgment appears in the instant record concerning the judgment of the trial court in favor of Respondent and its affirmance June 20, 1957, or was passed upon by the Supreme Court of Alabama.

That judgment of June 21, 1956, setting aside and annulling the judgment of the trial court is not, and cannot now be brought, within the jurisdiction of this Court.

The denial of certiorari in Davis, Admx., v. Alabama Great Southern Railroad Co., 324 U. S. 846, 89 L. ed. 1407, is clearly wholly inapposite here. There, it was not established as it is here that upon rendition of the judgment and opinion in question Petitioner was unable to produce any other, different or additional evidence on any further trial, could only go through the artificial formality of offering the identical record of evidence in the trial court with the foregone conclusion that the trial court could only apply the mandate of the judgment in question and enter a judgment against Petitioner and in favor of Respondent —and that thus the judgment in question (June 21, 1956) was a full, definitive and conclusive determination of any right claimed by Petitioner under the Act.

It is clear that **neither** judgment of the Supreme Court of Alabama is now within the jurisdiction of this Court.

III. The Petition Is Insufficient to Evoke Exercise of Any Discretionary Jurisdiction of This Court.

Having "shopped around"—in the United States District Courts at Jacksonville, Florida, and the Middle District of Alabama—Petitioner finally selected the courts of the State of Alabama to try her claim. Petitioner was accorded full, fair and painstaking hearings, in applying to her claim the correct rules of law under the FELA as long recognized by the Alabama Supreme Court (Reynolds v. Atlantic Coast Line Railroad Company, 251 Ala. 27, 36 So. 2d 102), **as expressly affirmed by this Court** (Reynolds v. Atlantic Coast Line Railroad Company, 336 U. S. 207, 93 L. ed. 618).

Petitioner now seeks to have this Court search the record and re-weigh the evidence really because "we didn't win." So unsure is the Petition of its ground that a major element of the request that this Court assume jurisdiction is false representation that the Supreme Court of Alabama slyly connived at Petitioner's undoing (Petition, pp. 2, 3, 8, and 12 to 21).

In addition to those already stated, other fundamental reasons why this Court should not, in the circumstances and posture of this case, grant the requested writ and undertake this review are cogently set out in the separate opinion of Mr. Justice Frankfurter in Rogers v. Missouri Pacific, 352 U. S. ...., 1 L. ed. 2d 520, 77 S. Ct. ..... We adopt by reference the statement of principles and authorities set forth in that opinion concerning the grant of writs of certiorari under the applicable statute and Rules of this Court. We shall not extend this reply by repeating the considerations there lucidly presented.

The profession has been taught to believe that the object and purpose of the discretionary review by this court of decisions of lower appellate courts, state and federal, in matters involving rights or issues under the Constitution

and laws of the United States is to achieve a uniformity and harmony in **recognition and interpretation of law**—not uniform and identical **results** in lawsuits. We have been taught that the facts, as such, in any particular case are of "no doctrinal importance." Yet in cases under the Federal Employers' Liability Act there appears to be a widespread notion that the desired "uniformity" is of **result**—and is to be equated with recovery by the employee.

But if we are not to substitute largess for law, it must be conceded that there **are** some cases in which the facts cannot, after allowing all intendments and despite whatever human sympathies may be evoked, which cannot support recovery or warrant submission to a jury on the question of liability (cf. Rogers v. Missouri Pacific, supra, footnote 26, page 501 of 1 L. ed.). As aptly put in the separate opinion of Mr. Justice Harlan in Rogers v. Missouri Pacific, supra (at page 519 of 1 L. ed. 2d):

> "No scientific or precise yardstick can be devised to test the sufficiency of the evidence in a negligence case. The problem has always been one of judgment, to be applied in view of the purposes of the statute. It has, however, been common ground that a verdict must be based on evidence—not on a scintilla of evidence but evidence sufficient to enable a reasoning man to infer both negligence and causation by reasoning from the evidence. Moore v. Chesapeake & O. R. Co., 340 U. S. 573, 95 L. ed. 547, 71 S. Ct. 428. And it has always been the function of the court to see to it that jury verdicts stay within that boundary, that they be arrived at by reason and not by will or sheer speculation. Neither the Seventh Amendment nor the Federal Employers' Liability Act lifted that duty from the courts."

If this Court is saddled with the necessity, or committed to the course, of combing the minutiae of record facts,

upon any request of the plaintiff, to "make the last guess", and to substitute its appraisal for that of the Court below concerning submission to the jury—then it must be a two-way street. If we are not to substitute largess for law then the **Defendant** in such cases must have the same correlative right under the same statute to invoke the same consideration on a conscientious claim of **insufficiency** of the evidence to warrant submission to a jury. It would be a monstrous system which would deny to one party a right of process freely accorded the other.

Thus, if this Court is required, or committed to the course, of such review as appears here requested then, to accord evenhanded justice and equality of treatment to litigants, it has the task of "riding herd" on the settlement of pleadings, the findings of fact and the appraisals of evidence by the lower courts country-wide in the multitude of contested suits arising under this Act.

We respectfully submit that the statutes do not require, that the rules of this Court do not contemplate, and that the public interest of the country does not demand, such review as is here requested.

IV. **Conclusion.**

Respondent respectfully submits that the several facts, authorities and reasons set out hereinabove abundantly demonstrate that the Petition presents nothing within the statutory jurisdiction of this Court to review, and that under the facts, circumstances and condition of the cause no appropriate occasion for the exercise by the Court of any discretionary jurisdiction to review is presented.

However, respect for the Supreme Court of Alabama as well as for this Court prevents our closing this reply without notice of further imputations advanced in the Petition as "reasons" why this Court should assume jurisdiction. As such "reasons" and regarding the opinion of the Su-

preme Court of Alabama the Petition bandies about such statements and charges as "evidences hostility to the federal statute," "capricious and unreasonable," "grave emasculation," etc.

Both the records of this Court and the opinions of the Supreme Court of Alabama in this cause conclusively show that the Supreme Court of Alabama carefully and explicitly recognizes and embraces, and recognized and embraced in this cause, the fundamental and continuing doctrine of the law as declared by this Court.

In the opinion accompanying the judgment of June 20, 1957 here sought to be reviewed (Petition, p. 2), the Alabama Supreme Court expressly adopted [p. 306 of 96 So. (2d)] its earlier definitive opinion [264 Ala. 522, 88 So. (2d) 189] wherein the governing principles prescribed by this Court were embraced and expressed as follows [p. 192 of 88 So. (2d)]:

> "Under the plain provisions of the Federal Employers' Liability Act the gist of the action is negligence on the part of the defendant which in whole or in part proximately caused the injury complained of. The plaintiff is required to present probative facts from which the negligence alleged and the causal relation between the negligence and the injury complained of can be reasonably inferred before such issues may be submitted to the jury." (Citing leading decisions of this Court.)

And further in that opinion, in summation of the principles so embraced, the Court again referred to and quoted from its opinion in Reynolds v. Atlantic Coast Line Railroad Co., 251 Ala. 27, 36 So. (2d) 102 (affirmed 336 U. S. 207, 93 L. ed. 618), quoting as follows [p. 194 of 88 So. (2d)]:

> "A party claiming under the act must in some adequate way establish negligence, and it must appear

that such negligence was the proximate cause, in whole or in part, of the accident. * * *."

In its earlier opinion in Reynolds v. Atlantic Coast Line Railroad Co., supra, the Alabama Court had thus stated and embraced the doctrines laid down by this Court [p. 104 of 36 So. (2d)].

> "The case of course is governed by the federal decisions, and as we have recently said in the case of Atlanta, Birmingham and Coast R. R. Co. v. Cary, Ala. Sup., 35 So. 2d 559, 560: 'Under these decisions the Federal Employers' Liability Act does not make the employer the insurer of the safety of the employee while on duty. And the basis of liability is the negligence of the employer, not the fact that injuries occur. Negligence must be "in whole or in part" the cause of the injury.'
>
> "A party claiming under the Act must in some adequate way establish negligence, and it must appear that such negligence was the proximate cause, in whole or in part, of the accident." (Citing leading decisions of this Court.)

In its affirmance of the Alabama Court's decision in the Reynolds case, supra, this Court said (p. 620 of 93 L. ed.):

> "The Alabama Supreme Court conceded that the complaint adequately charged negligence in the failure to remove the canes and in the failure to provide a competent fellow servant. It held, however, that the facts alleged did not show that the accident resulted, in whole or in part, from that negligence. We cannot say that the Supreme Court of Alabama erred."

Thus, both the records of this Court and the opinions of the Supreme Court of Alabama in this cause conclu-

sively demonstrate that the Supreme Court of Alabama has long and consistently recognized and embraced the fundamental and continuing doctrine of the law as declared by this Court in Tennant v. Peoria and Pekin Union Railroad Company, 321 U. S. 29, 88 L. ed. 520, as follows:

> "In order to recover under the Federal Employers Liability Act it was **incumbent upon Petitioner to prove** that Respondent was negligent **and that such negligence was the proximate cause in whole or in part of the fatal accident.**
>
> "Petitioner was required to present **probative facts from which the negligence and the causal relation could be reasonably inferred.** The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked." (Authorities cited.) (Emphasis added.)

The best that can be said for those indicated further imputations in the Petition is that they are misleading.

It is respectfully submitted that the Petition should be dismissed or denied.

Respectfully submitted,

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NORMAN C. SHEPARD,
Counsel for Respondent.

GRAHAM, BIBB, WINGO & FOSTER,
1115 First National Building,
Birmingham, Alabama,
Of Counsel.

Certificate of Service.

I, Peyton D. Bibb, one of the Attorneys for the Atlantic Coast Line Railroad Company, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 3rd day of October, 1957, I served a full, true and correct copy of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari to the Supreme Court of Alabama, on Mildred S. Stinson, as Administratrix, etc., Petitioner, by mailing, air mail, such copy in a duly addressed envelope with first class Air Mail postage prepaid, to her Attorney of Record, Joseph S. Lord III, Esq., addressed as follows:

Joseph S. Lord, III, Esq.,
Attorney for Mildred S. Stinson as Administratrix
of the Estate of A. Bruce Stinson,
Broad and Sansom Streets,
Philadelphia 7, Pennsylvania

and duly deposited the same in a United States Post Office mail box.

Peyton D. Bibb,
1115 First National Building,
Birmingham, Alabama,
Attorney for Atlantic Coast
Line Railroad Company,
Respondent.

PAGE 44 OF DOCKET 107.

[SEE DOCKET 108, PAGE NUMBER 198, 6 Div. 106, FOR SECOND APPEAL]

DIV. NO. 11

[88 So. 2d 189]

WILLIAM ROBBY, JR.

Peyton D. Bibb - - -
Graham, Bibb, Wingo
and Foster
First National Bldg
B'ham, Alabama

6 Cys 11-20-54(Printed)
4 Cys 1-10-55(reply) - -
4 Cys 4/28/55(reply to rng)
5 Cys Letter 8/5/55

(4 Cys Letter in response to
Lord's letter of April 16,
filed 4/23/56/(on rng)(PD-Bibb)

ATLANTIC COAST LINE RAILROAD COMPANY

vs

MILDRED S. STINSON, AS ADMINISTRATRIX
OF THE ESTATE OF A. BRUCE STINSON, DECEASED.

G. Ernest Jones, Jr.
Beddow and Jones
Joseph S. Lord, III (Letter Dec.3 correcting
Richter, Lord and Parage page 8 of brf.)
(Philadelphia, Penn.)-6 Cys 12/3/54
121 South Broad St. Building (Broad and Sansom Streets)(4 Cys Let. 12-7-54)

7 Cys 4/14/55(On rng) (4 Cys Letter from Lord, III, 4/16/56)
5 Cys 5/11/55 (reply) Photostatic cy Op.U.S. attached)
JEFFERSON CIRCUIT COURT - NO. 27471-X
(Thomas E. Huey, Jr.) STAKELY, J

APRIL 14, 1954	CERTIFICATE FILED
APRIL 20, 1954	CONTINUED
NOVEMBER 16, 1954	TRANSCRIPT FILED
NOVEMBER 16, 1954 -	SPECIAL CERTIFICATE OF CLERK ACCOMPANYING EXHIBITS, VIZ.: Deft's Ex. 1: Plaintiff's Exs. 3, 4: Deft's Ex. 2: Deft's Ex. 3: Deft's Ex. 4: Deft's Ex. 5
NOVEMBER 23, 1954	ARGUED AND SUBMITTED-(Livingston, C. J., Lawson, Stakely, and Merrill, JJ.)
MARCH 31, 1955	REVERSED AND REMANDED
MARCH 31, 1955	CERTIFICATE AND OPINION ISSUED

APRIL 14, 1954	CERTIFICATE FILED
APRIL 20, 1954	CONTINUED
NOVEMBER 16, 1954	TRANSCRIPT FILED
NOVEMBER 16, 1954 -	SPECIAL CERTIFICATE OF CLERK ACCOMPANYING EXHIBITS, VIZ.: Deft's Ex. 1: Plaintiff's Exs. 3, 4: Deft's Ex. 2: Deft's Ex. 3: Deft's Ex. 4: Deft's Ex. 5
NOVEMBER 23, 1954	ARGUED AND SUBMITTED-(Livingston, C. J., Lawson, Stakely, and Merrill, JJ.)
MARCH 31, 1955	REVERSED AND REMANDED
MARCH 31, 1955	CERTIFICATE AND OPINION ISSUED

APRIL 14, 1955	APPLICATION FOR REHEARING FILED BY APPELLEE
APRIL 14, 1955	CERTIFICATE OF RECALL ISSUED, ORDER, STAKELY, J.
APRIL 20, 1955	CERTIFICATE AND OPINION RETURNED PURSUANT TO RECALL
JULY 30, 1955	LETTER (July 28, 1955) FROM JOSEPH S. LORD, III, CONTAINING CITATION OF SOUTHERN RWY CO V. NERSE, 216 F. (2d) 772 (C.A. 4th, 1954) TRANSMITTED TO JUSTICES WHO CONCURRED IN ORIGINAL OPINION
AUGUST 5, 1955 -	LETTER (Aug. 4) FROM PEYTON D. BIBB IN RESPONSE TO LETTER OF JOSEPH S. LORD, III, FILED
APRIL 16, 1956 -	FOUR COPIES LETTER FROM JOSEPH S. LORD, III WITH PHOTOSTATIC COPY U. S. DECISION SCHULZ, ADMRX. V. PENNSYLVANIA RAILROAD CO. FILED ON REHEARING
APRIL 23, 1956 - - -	LETTER FROM PEYTON BIBB IN RESPONSE TO LORD'S LETTER OF APRIL 16, 1956, RECEIVED, FILED, DISTRIBUTED
JUNE 21, 19 - - -	APPLICATION FOR REHEARING OVERRULED: NO OPINION WRITTEN (Pages 7, 8, 10 and 11 rewritten to insert "in whole or in part")
JUNE 21, 1956 - -	CERTIFICATE OF REVERSAL AND COPY OF OPINION RETURNED TO CLERK

(OVER)

JANUARY 24, 1957 - ---	EXHIBITS FILED ON NOVEMBER 16, 1956, returned to MR. JULIAN SCHUPT, CLERK JEFFERSON CIRCUIT COURT, AT REQUEST OF O. ERNEST JONES, ON AUTHORITY OF STANLEY, J. (REGISTERED MAIL: RETURN RECEIPT REQUESTED)
AUGUST 21, 1957	PREPARATION OF RECORD TO ACCOMPANY RECORD IN 6 DIV. 106 ON APPEAL TO SUPREME COURT OF THE UNITED STATES. PORTION OF CERTIFIED COPY OF RECORD FURNISHED BY JOSEPH LORD, III: PORTION OF RECORD PHOTOSTATED BY BLUE PRINT SERVICE. ONLY PHOTOSTATED PAGES CHARGED FOR. $38.00 RECORD SENT TO MR. JOSEPH S. LORD, III., PHILADELPHIA, PENN. VIA REGISTERED MAIL, RETURN RECEIPT REQUESTED.
AUGUST 29, 1957 -	CHECK FOR $38.00 made payable to Blueprint Service Company. Provident Tradesmens Bank and Trust Company, Philadelphia, Pa., received from Richter, Lord and Levy for copy of record prepared for U.S. Supreme Court. Sent to Blueprint Service Company.

STATE OF ALABAMA--JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM 1955-56

6th Div. No. 736

ATLANTIC COAST LINE RAILROAD COMPANY, Appellant

v.

MILDRED S. STINSON, AS ADMINISTRATRIX OF THE ESTATE OF A. BRUCE STINSON, DECEASED, Appellee

From JEFFERSON CIRCUIT NO. 27471-X Court.

The State of Alabama,
City and County of Montgomery

I, J. Render Thomas, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing pages numbered from one to two inclusive, contain a full, true, and correct copy of the Sheet Numbered 44 from Docket 197, October Term 1955-56, showing the entries made and entered in the above styled cause, particularly the entry made and entered on June 21, 1956, "Application for rehearing

ATLANTIC COAST LINE RAILROAD COMPANY, Appellant

v.

MILDRED S. STINSON, AS ADMINISTRATRIX OF THE ESTATE OF A. BRUCE STINSON, DECEASED, Appellee

From JEFFERSON CIRCUIT NO. 27471-X Court

The State of Alabama,
City and County of Montgomery

I, J. Render Thomas, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing pages numbered from one to two inclusive, contain a full, true, and correct copy of the Sheet Numbered 44 from Docket 197, October Term 1955-56, showing the entries made and entered in the above styled cause, particularly the entry made and entered on June 21, 1956, "Application for rehearing
overruled: No opinion written [Pages 7,8,10 and 11 rewritten to insert 'in whole or in part'"], by said Supreme Court, as the same appears and remains of record and on file in this office.

~~Witness~~ J. Render Thomas, Clerk of the Supreme Court of Alabama, this the 11th day of SEPTEMBER 19 57.

J. Render Thomas
Clerk of the Supreme Court of Alabama

OPINION ON FIRST APPEAL.

(October Term, 1955-56,
6th Div. No. 736.)

ATLANTIC COAST LINE RAILROAD CO.

v.

MILDRED S. STINSON, as Adm'x.

6 Div. 736.

Supreme Court of Alabama.

March 31, 1955.

Rehearing Denied June 21, 1956.

264 Ala. 522, 88 So. 2d 189.

Stakely, Justice.

This is an action instituted against the Atlantic Coast Line Railroad Company under the Federal Employers' Liability Act, 45 U. S. C. A., § 51 et seq., by Mildred S. Stinson, as administratrix of the estate of A. Bruce Stinson, deceased, to recover damages for his death. Liability is predicated upon the alleged negligence of the defendant in the operation of its railroad which allegedly caused the death of the deceased, while in its employment. Upon the trial there was a verdict for the plaintiff and a judgment rendered thereon. Motion for a new trial was overruled and hence this appeal.

As submitted to the jury the complaint as last amended consisted only of count 5. In substance it alleged that A. Bruce Stinson was an employee of the defendant railroad and was killed while acting within the line and scope of his employment and that the defendant railroad was engaged in interstate commerce at the time of the death of decedent. It was further alleged that the death of Stinson resulted from the negligence of one or more of the officers, agents or employees of the defendant, whose name and names are

unknown to the plaintiff, while acting within the line and scope of their employment in this to wit: that he or they so negligently operated the aforesaid railroad train of the defendant as to cause plaintiff's intestate to be run over, upon or against by the said railroad train and as a proximate result and consequence thereof plaintiff's intestate was killed.

The defendant filed a plea of the general issue in short by consent with leave to give in evidence any matter which would be admissible in evidence if well pleaded and with leave to the plaintiff to make like reply.

The proof shows that on August 6, 1951, the crew of Work Extra 1707 consisting of conductor L. B. Cloud, flagman C. C. Hayes, brakeman Joe Murphy, fireman W. F. Cook and engineer A. B. Stinson was called to duty at Montgomery, Alabama, to report to Ramer, Alabama, to handle a wrecker for a train that had been derailed. When Work Extra 1707 arrived at Ramer they took over the work train, received the usual work train orders and proceeded to the place of the derailment, which was between 2½ and 3 miles beyond Ramer. They arrived at the scene of the derailment at about 9:45 p. m. At this time Work Extra 1707 was made up of the following cars from the front to the rear:

1. Wrecker
2. Wrecker tank
3. Engine
4. Gondola car of ties
5. Gondola car of coal
6. Flat car or wheel car
7. Bunk car
8. Kitchen car
9. Living and dining car
10. Caboose.

Upon arrival at the scene of the derailment all cars were cut from the engine except the wrecker cars. The engine and the wrecker cars were then moved forward by Stinson, the engineer, about four car lengths, nearer the derailment and "spotted." After the engine of Work Extra 1707 had been "spotted" by Stinson as aforesaid, its fireman Wm. F. Cook, upon receiving permission from Stinson, left the engine to go to the wreck and "to look around."

At 10:15 another train, the Western Wrecker, consisting of a total of five cars, arrived at the western end of the derailed cars. On this train was a fireman named McClain.

When fireman Cook returned to Work Extra 1707 fireman McClain of the Western Wrecker was in the engine cab of Work Extra 1707 but Stinson was not. McClain told Cook that Stinson had been on the engine when he reached it and had asked him (McClain) to look out for the engine "until Stinson or Cook returned."

There was proof that after Stinson had left his engine he went to the kitchen car of 1707 and ate a plate of food given him by the cook. He left the dining car, leaving his cap on a stool. Stinson did not return to his engine. He was never seen alive after having left the dining car. There was proof that at the time Stinson left the dining car the cars were standing still and they were not moved, according to conductor Cloud, until it was "right at 10:30." Other testimony shows that after rerailing the wrecked car there was a coupling movement to the rerailed car, a lowering of the boom on the wrecker; a coupling to the rest of the train and then that conductor Cloud, who watched this operation, walked back to the caboose at the rear of the train before the move actually started on his signal given from the rear end of the caboose.

Stinson was not found until about two or three hours later after he left the diner with W. C. Stripling, the engi-

neer of Through Train 216, going towards Ramer after the track had been cleared, discovered Stinson's nude body severed across the north rail of the track at a point something over three-fourths of a mile from where he had last been seen at the diner. The lower part of Stinson's body was between the rails with the feet angling down the hill toward the west. The upper part was outside the rail with the head turned downhill. The arms were pulled back to the shoulders, the hands were gripped and the body was naked except for the socks. His clothes were found "wadded up" about 150 feet from the body toward the derailment. There was evidence of blood on the tracks and scuff marks to indicate he was dragged the 150 feet from the clothes to where the body was found.

There was proof showing that fireman Cook in Stinson's absence in operating the engine made three separate back-up moves. First, after coupling to the rerailed hopper, he moved back two car lengths and stopped so that the boom of the wrecking derrick could be swung; second, he moved back the remaining two car lengths, separating the engine from the cut cars in order to couple; third, he moved back two and one-half to three miles to Ramer. This last move was made without incident at about ten miles per hour, the caboose being in the lead.

When the absence of Stinson was noted the train was inspected at Sprague, which is a place on the railroad between Ramer and Montgomery. A lot of blood was found on the northeast wheel of the wheel car and a small amount of blood on the wheel next to it. Blood was also found on the body bolsters and truck bolsters of the same car. Portions of the stomach and lungs were found between the brackets of the wheel (a roll of metal cast into the inside of the wheel). There was no blood on the wheels of the caboose or of the other cars between it and the wheel car. So far as we can discover there is nothing in the record to

show that any portion of the clothing of the deceased or any shred thereof, was found beneath the wheel car or under any other part of the train.

The proof showed rules of the Atlantic Coast Line Railroad Company as follows:

As to Engineers (Enginemen)—Rule 972: "They must not leave their engines during a trip except in cases of necessity, and then the fireman or some other competent person must be left in charge of the engine."

Rule 973:—"They must not permit an unauthorized person to run the engine. They may permit the fireman to do so, but only under their immediate supervision."

As to Firemen. Rule 990:—"Firemen will report to the Trainmaster in all matters connected with the movement of trains and engines; to the Master Mechanic in all matters relating to motive power. They must comply with instructions of the Road Foreman of Engines and other Mechanical Department Officers. They must comply with instructions of the engineman (engineer) while on duty. At stations and yards they are under the jurisdiction of the Station Master or Road Master; within shop limits, of the Engine House Foreman."

Rule 994:—"They must remain on engines during switching operations, unless otherwise directed. They must take charge of the engine should the engineman be absent, and must not leave the engine during absence of engineman, nor permit any unauthorized person upon the engine. If engineman should become disabled they must stop the engine. They must not run an engine in the absence of the engineman unless, in an emergency, they are directed to do so by the conductor or some other person in authority."

In addition to the rules pertaining to the fireman and engineer, the following rules were shown:

"Rule 20:—The engine bell must be rung when an engine is about to move except in instances where the stop and start, either forward or backward, is momentary, and is a continuous switching move and while approaching and passing public crossings at grade, while passing trains on an adjacent track, and when necessary to prevent accidents."

Rule 33:—"The unnecessary use of the horn, whistle or bell is prohibited."

Rule 108:—"In case of doubt or uncertainty, the safe course must be taken."

The fundamental question in the case is whether the court erred in refusing the affirmative charge requested in writing by the defendant.

In reviewing the court's refusal to give the affirmative charge in Atlantic Coast Line R. Co. v. McMoy, 261 Ala. 66, 73 So. 2d 85, 90, this court said:

> "Error is predicated on the refusal of the court to give the general affirmative charge with hypothesis. It is well understood that actionable negligence may be established by circumstantial evidence. Atlantic Coast Line R. Co. v. Taylor [260 Ala. 401], 71 So. 2d 27; Atlanta & St. Andrews Bay Ry. Co. v. Burnett, 259 Ala. 688, 68 So. 2d 726; Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916; Tennant v. Peoria & P. U. R. Co., 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520. Furthermore, where the affirmative charge was refused the defendant, the entire evidence must be viewed in its most favorable aspect to the plaintiff and where this is done and a reasonable inference may be drawn adverse to the party requesting the affirmative charge, such charge is properly refused. Atlantic Coast Line R. Co. v. Taylor, supra, and cases cited therein. * * *"

[1] Under the plain provisions of the Federal Employers' Liability Act the gist of the action is negligence on the part of the defendant which in whole or in part proximately caused the injury complained of. The plaintiff is required to present probative facts from which the negligence alleged and the causal relation between the negligence and the injury complained of can be reasonably inferred before such issues may be submitted to the jury. Atlantic Coast Line Railroad Co. v. Barnes, 261 Ala. 496, 75 So. 2d 91; Reynolds v. Atlantic Coast Line Railroad Co., 251 Ala. 27, 36 So. 2d 102, affirmed 336 U. S. 207, 69 S. Ct. 507, 93 L. Ed. 618; Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916; Tennant v. Peoria & P. U. R. Co., 321 U. S. 29, 64 S. Ct. 409, 88 L Ed. 520; Atlantic Coast Line Railroad Co. v. McMoy, supra.

There are three cases strongly relied on by the appellee to which we wish to refer at this point. In Lavender v. Kurn, supra, the Supreme Court of the United States held that the case was a case for the jury, that actionable negligence may be established by circumstantial evidence and that where the jury returns a verdict on probative facts from which negligence which in whole or in part proximately caused the injury may reasonably be inferred, it is no answer to say that the jury's verdict involved speculation and conjecture. In Lavender v. Kurn, supra, it was shown that the decedent suffered the injuries from which he died at a place where his duties required him to be. The railroad contended that the decedent was murdered but the court held that where there was proof of probative facts from which it could be inferred that the negligence of the railroad in whole or in part proximately caused the death of the decedent, the court on appeal would not disturb the verdict on the theory that the jury speculated as to whether death was the result of negligence or grew out of some other cause.

This court as it was its duty to do followed the reasoning in the foregoing decision of the Supreme Court of the

United States in Atlanta & St. Andrews Bay Ry. Co. v. Burnett, 239 Ala. 688, 68 So. 2d 726, and in Atlantic Coast Line Railroad Co. v. McMoy, supra, and held that since there was proof of probative facts from which the jury had a right to infer negligence of the defendant and that the decedent was killed by the railroad at a place where his duties to the railroad required him to be, the court would not speculate as to whether at the time of his death he was doing his duty or engaging in something not pertaining to his duty. We call attention to the fact that both in Atlanta & St. Andrews Bay Ry. Co. v. Burnett, supra, and Atlantic Coast Line R. Co. v. McMoy, supra, the work of the decedent required him to work on the ground alongside of or between the cars of the defendant railroad.

[2, 3] As we read the present record, there appears to be a conflict in the evidence as to whether fireman Cook in running the engine abided by the rules of the company in making the movements to which we have referred, in the absence of the engineer and in his failure to ring the bell at each movement. Upon a careful consideration it is our view that the plaintiff was entitled to go to the jury on these issues, which means that there was sufficient evidence for the jury to find that there was negligence on the part of the Atlantic Coast Line Railroad Company. Violation of one of defendant's rules is evidence of negligence. Tennant v. Peoria & P. U. R. Co., supra; Tiller v. Atlantic Coast Line R. Co., 323 U. S. 574, 65 S. Ct. 421, 89 L. Ed. 465; Alabama Great Southern Railroad Co. v. Davis, 246 Ala. 64, 18 So. 2d 737.

This brings us to what we regard as the vital question in the case. Did the negligence, if any, of the defendant railroad in whole or in part proximately result in the death of Stinson?

The proof shows that Stinson's nude body was found severed across the rail of the track about three-fourths of a mile from where he had last been seen alive over two hours

before. All of his clothes except his socks which he had on were found "wadded up together" about 150 feet nearer to the place where he had last been seen alive than where his body was found. There were markings on the track indicating that something had been dragged between the place where the nude body was and the clothing. There was no evidence, however, as to how the engineer got from the diner, the place where he was last seen alive, to the above spot about three-fourths of a mile away. There was no evidence as to what he was doing and had been doing in the meantime. There was no evidence as to how he became nude. There was no evidence that he was alive and on the track at the time any train movement approached and passed the point where his body was found.

[4] Can it be said that there was any evidence which showed that Stinson's body was found at a place where his duty required him to be, as was the situation in the cases cited above? The duties of Stinson required him to be on the engine in order to operate the engine as its engineer. We consider it to be a correct principle that when a railroad provides food for its employees and they are using the facilities so provided to prepare themselves for their work or to rest and recuperate, they must be regarded as in its employ—Mostyn v. Delaware L. & W. R. Co., 2 Cir., 1947, 160 F. 2d 15, certiorari denied 1947, 332 U. S. 770, 68 S. Ct. 82, 92 L. Ed. 355; Virginian Ry. Co. v. Early, 4 Cir., 1942, 130 F. 2d 548; North Carolina R. Co. v. Zachary, 1914, 232 U. S. 248, 34 S. Ct. 305, 58 L. Ed. 591.

We consider that in going to the diner Stinson was acting within the line and scope of his employment. His next duty would be to return from the diner to the engine. However, as we have pointed out, there was no evidence as to what happened after he left the diner and we can only speculate as to what proximately caused Stinson's death and if it was in the course of his employment, there being no duty of Stinson to perform which we can infer that he

was doing when he was struck by the movement of the train. Under all the evidence there was no duty on Cook to find out where Stinson was or to anticipate peril to him. Stinson had no duties to perform in between or alongside the cars of the train, as was the situation in Atlanta & St. Andrews Bay Ry. Co. v. Burnett, supra, and Atlantic Coast Line Railroad Co. v. McMoy, supra, referred to above. Alabama Great Southern R. Co. v. Davis, 246 Ala. 64, 18 So. 2d 737.

[5] Consequently the evidence fails to show probative facts from which a jury could infer that when Stinson was run over by the train, he was where his duty required him to be. Since this is true, the evidence does not show that the negligence, if any, of the defendant in whole or in part proximately caused his death. Brady v. Southern Railway Co., 320 U. S. 476, 64 S. Ct. 232, 88 L. Ed. 239; Reynolds v. Atlantic Coast Line R. Co., supra. In the last cited case this court said:

> "A party claiming under the Act must in some adequate way establish negligence, and it must appear that such negligence was the proximate cause, in whole or in part, of the accident.
>
> * * * * * * *
>
> "In order to state a cause of action, it must be made to appear by proper averments [and, we interpolate, by proper proof] that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." [251 Ala. 27, 36 So. 2d 104.]

We conclude that the court was in error in refusing to give the affirmative charge as requested by the defendant in the lower court.

Reversed and remanded.

Livingston, C. J., and Lawson and Merrill, JJ., concur.

OPINION ON SECOND APPEAL.

THE STATE OF ALABAMA
Judicial Department
The Supreme Court of Alabama
October Term, 1956-57

6 Div. 106

MILDRED S. STINSON, as Administrator, etc.,
v.
ATLANTIC COAST LINE RAILROAD COMPANY.

June 20, 1957.

... Ala. ..., 96 So. 2d 305.

Merrill, Justice.

This is the second appeal in this cause. On the first trial in circuit court, judgment was entered in favor of plaintiff Stinson. On appeal, this court decided that the defendant, Atlantic Coast Line Railroad Company, was entitled to the affirmative charge, and the judgment was reversed and the cause remanded. **Atlantic Coast Line Railroad Co. v. Stinson**, 264 Ala. 522, 88 So. 2d 189. Under these circumstances, there being no final judgment, it was impossible to apply to the Supreme Court of the United States for a review of the decision of this court.

When the cause again came on for trial, the parties, by stipulation, submitted the cause to the jury on the identical pleadings, testimony, evidence and rulings of the court as on the original trial. The trial court properly gave the requested written affirmative charge for the defendant and plaintiff effected this appeal.

This court continues to hold that the affirmative charge was properly given, and that the judgment of the circuit

court should be affirmed. For the sake of brevity, and to avoid the setting out of the original opinion verbatim, we hereby adopt the opinion in **Atlantic Coast Line Railroad Co. v. Stinson,** 264 Ala. 522, 88 So. 2d 189, as our opinion in the instant case.

We feel that we should correct the concurrences in our original opinion as listed in the printed reports. Upon original deliverance, Chief Justice Livingston, Justices Lawson and Merrill concurred in the opinion by Mr. Justice Stakely, as reported. On application for rehearing, Chief Justice Livingston was of the opinion that the application for rehearing ought to be granted. That necessitated the consideration of the opinion by the entire court. At that consultation, all the justices concurred except Chief Justice Livingston, who dissented. The original record shows a notation of such dissent. This explanation is included only for the sake of accuracy.

The appellee in the instant cause has filed a motion to dismiss the appeal. We have carefully considered the grounds listed in the motion and those argued in brief, and we are of the opinion that in this particular case, they are not sufficient to warrant the dismissal of the appeal. Motion overruled.

Affirmed.

All the Justices concur, except Livingston, C. J., who dissents.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

Number 442

MILDRED S. STINSON,
as Administratrix of the Estate of A. Bruce Stinson,
Deceased, suing as such Administratrix,
Petitioner,

—vs—

ATLANTIC COAST LINE RAILROAD COMPANY,
Respondent.

Reply to Petitioner's Motion Under Rule 35

PEYTON D. BIBB
NORMAN C. SHEPARD
Attorneys for Respondent.

GRAHAM, BIBB, WINGO & FOSTER
First National Bank Building
Birmingham, Alabama
Of Counsel for Respondent

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

Number 442

MILDRED S. STINSON,

as Administratrix of the Estate of A. Bruce Stinson, Deceased, suing as such Administratrix,

Petitioner,

—vs—

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

REPLY TO PETITIONER'S MOTION UNDER RULE 35

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States

ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

In reply to the Petitioner's Motion under Rule 35 for modification of the Court's order of November 18, 1957, Respondent shows unto the Court:

1. The purported statements of record facts and issues made in such motion are incorrect in most material parts.

2. As Respondent has repeatedly pointed out, the only judgment subject to review here is the judgment of the Supreme Court of Alabama entered June 20, 1957 (Petition, p. 2 and its Appendix, p. 27a), which affirmed a verdict of the jury and a judgment of the trial court in favor of this Respondent. The only rec-

ord of the court below which is properly before this Court is the record made upon the second trial and the Petitioner's appeal to the Supreme Court of Alabama from that verdict and judgment adverse to her. The Petitioner's instant motion high-lights the chaos involved in undertaking to decide important contested issues upon a writ of certiorari to a final judgment of a State Court by reinstating a prior judgment of the trial court upon issues which were not involved in the appeal to the State Supreme Court to which the writ was directed.

3. While the record on appeal in the Supreme Court of Alabama on the first appeal is not properly before this Court, at least some parts of it appear to have been physically filed with the Clerk and described by Petitioner only as "certified copy of first trial and judgment of S. Ct. of Alabama". If complete, that record will show, and Respondent hereby certifies, that there were **thirty-seven Assignments of Error** by Respondent (Appellant on that Appeal) on Respondent's appeal to the Supreme Court of Alabama, which involved many different questions. In its original opinion (264 Ala. 522, 88 So. 2d 189) the Supreme Court of Alabama dealt only with the Assignments of Error (numbers 3 and 4) which concerned refusal by the trial court to direct a verdict of the jury in favor of Respondent. In its opinion the Supreme Court of Alabama stated the question then decided as follows:

> "The **fundamental** question in the case is whether the Court erred in refusing the affirmative charge requested in writing by the Defendant."

On the first appeal the Supreme Court of Alabama then concluded that refusal of the affirmative charge requested by Defendant (Respondent) was error neces-

sitating reversal, which was ordered. The Alabama Supreme Court did not, nor was there any occasion for it to pass upon any of Respondent's thirty-five other assignments of error on that first appeal, since the judgment was reversed and a new trial ordered on the ground stated. If the documents now in the Clerk's hands do not include the "Assignments of Error" on the first appeal, Respondent will on notice from the Clerk have a certified copy promptly filed.

4. On the second appeal (by Petitioner from the separate verdict of the jury and judgment of the Court in favor of Respondent) the sole assignment of error and the only question presented to the Supreme Court of Alabama was whether the trial court properly directed the jury to return a verdict in favor of Respondent. Obviously, none of the other thirty-five assignments of error or issues presented on a wholly different prior appeal by Respondent were in any way before the Supreme Court of Alabama on the second appeal by the opposite party.

WHEREFORE, Respondent says that Petitioner's Motion to modify the order of November 18, 1957, in the respects contended for is not well taken and should be dismissed.

Respectfully submitted,

PEYTON D. BIBB
NORMAN C. SHEPARD
Attorneys for Respondent.

GRAHAM, BIBB, WINGO & FOSTER
First National Bank Building
Birmingham, Alabama
Of Counsel for Respondent.

CERTIFICATE OF SERVICE

I, Norman C. Shepard, one of the attorneys for the Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 23rd day of December, 1957, I served a full, true and correct copy of the foregoing Reply to Petitioner's Motion Under Rule 35 on Mildred S. Stinson, as Administratrix, etc., Petitioner herein, by mailing such copy in a duly addressed envelope with first class Air Mail postage prepaid to her Attorney of Record, Joseph S. Lord III, Esq., addressed as follows:

JOSEPH S. LORD III, Esq.,
c/o Messrs. Richter, Lord & Levy,
Broad and Sansom Streets,
Philadelphia 7, Pennsylvania,

and duly deposited the same in the United States Post Office at Wilmington, North Carolina on said date.

NORMAN C. SHEPARD

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

Number 442

MILDRED S. STINSON,
as Administratrix of the Estate of A. Bruce Stinson,
Deceased, suing as such Administratrix,
Petitioner,

—vs—

ATLANTIC COAST LINE RAILROAD COMPANY,
Respondent.

PETITION FOR REHEARING.

PEYTON D. BIBB
NORMAN C. SHEPARD
Attorneys for Respondent.

GRAHAM, BIBB, WINGO & FOSTER
First National Bank Building
Birmingham, Alabama
Of Counsel for Respondent

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MILDRED S. STINSON,
as Administratrix of the Estate of A. Bruce Stinson, Deceased, suing as such Administratrix,

Petitioner,

—vs—

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

PETITION FOR REHEARING

Comes the Respondent, Atlantic Coast Line Railroad Company, by its Attorneys, and petitions the Court for a rehearing upon its opinion and order entered herein on the 18th day of November, 1957, and moves the Court that the mandate thereon be withheld pending consideration hereof and that the opinion and order entered November 18, 1957, be withdrawn and that this cause be restored to the docket for hearing upon the issues involved as provided by the Rules of this Court. As grounds therefor, Respondent shows unto the court:

1. The order of November 18, 1957 improperly deprives Respondent of his right to be heard upon the merits of the case.

2. Upon reversal of a jury verdict and judgment for Respondent, this Court may not properly reinstate a prior verdict of the jury and judgment in favor of the opposite party (Petitioner) which had been annulled by the Supreme Court of Alabama in the exercise of its plenary power on a prior appeal.

3. The summary opinion erroneously concludes that the evidence in the record is sufficient to provide a **reasonable inference** that any negligence of the Respondent operated as the proximate cause, in whole or in part, of the employee's death.

ARGUMENT

Respondent will briefly elaborate upon these three grounds in the same order as they appear.

1. (a) In reversing the judgment of the Supreme Court of Alabama which affirmed a verdict of the jury and judgment of the trial court in favor of Respondent, and (b) in undertaking to reinstate a prior judgment of recovery in favor of Petitioner, the summary order and opinion of November 18, 1957 improperly and unlawfully deprives Respondent of the right to be heard upon the merits of the case in keeping with law and the rules of this Court and thus denies Respondent its right to a fair and impartial trial.

In our constitutional Republic, the right to be heard is the heart and the core of the administration of justice. Orderly and stable rules of procedure are the sine qua non of undertaking to achieve it.

Conforming to the requirement of Paragraph 1, Rule 24, our brief in opposition to the grant of the

Petition for Writ of Certiorari was confined to the preliminary question whether this Court properly has or should take jurisdiction of this case, or "why the cause should not be reviewed by this Court". (Respondent's brief, pages 7, 8, footnote No. 5). Respondent had the right to assume, and was required to anticipate, that upon the granting of the Petition further proceedings would be held conformably with Rules 26 and 36 (establishment, printing and distribution of the appropriate record), the preparation and filing of definitive briefs and arguments on all issues affecting the merits of the cause (Rule 41), and the right to be further heard upon the issues in keeping with the express provisions of Rules 43 and 44.

The summary order of November 18th not only deals with the merits as related to the particular judgment of the Supreme Court of Alabama affirming a verdict and a judgment of the lower Court in favor of Respondent, but it goes much farther. It takes even a wider reach, for after reversing the verdict and judgment in favor of this Respondent, it undertakes to "leap frog" back and reinstate a former verdict and judgment of the trial Court in favor of the Petitioner which had theretofore become a complete nullity by the formal action of the Supreme Court of Alabama on a former appeal. All this the summary order of November 18, 1957 does in complete disregard of the rules of procedure adopted and published by the Court for the administration of justice (Rules 26, 36, 41, 43 and 44).

Respondent earnestly submits that the summary order of November 18, 1957 improperly and unlawfully deprives this Respondent of its right to be heard

upon the merits of the case in keeping with its rights and the rules of this Court, and thus denies to Respondent its right to a fair and impartial trial.

2. On June 12, 1953 Petitioner by jury verdict was awarded $46,600. On appeal to the Supreme Court of Alabama that judgment was reversed and remanded for new trial in conformity with the Court's opinion (88 So. 2d 189). The original verdict was thereupon set aside and expunged from the record as though it had never existed.

(a) In undertaking to reinstate that prior verdict and judgment which had become a complete nullity, the order of November 18, 1957 exceeds the lawful authority and proper power of this Court.

The judgment posed for review by this Court is the judgment of the Supreme Court of Alabama entered June 20, 1957 (Petition, p. 2 and its Appendix, p. 27a) which affirmed a judgment of the trial court **in favor of Respondent based upon a verdict of the jury in favor of Respondent,** returned after instructions to the jury by the trial court (R. 23). The record also shows that upon a previous trial the issues had been submitted to the jury by the trial court upon instructions held to be erroneous by the Supreme Court of Alabama on proper appeal (R. 31-32) and that such prior verdict and judgment had been reversed and annulled by the Supreme Court of Alabama on June 21, 1956 (**Atlantic Coast Line Railroad Company v. Stinson,** 264 Ala. 522, 88 So. 2d 189) and the case remanded to the trial court for a new trial.

The only question actually passed upon by the Supreme Court of Alabama on such prior appeal was

whether the trial court correctly instructed the jury upon the issues made by the evidence. Whether the reasoning of the Supreme Court of Alabama on this first appeal was sound or unsound, the conclusive result of its judicial action on the case before it on proper appeal was to restore the case to the jury trial docket of the trial court as though the case had never been tried.

In this posture of affairs, the earlier annulled verdict and judgment may not now be properly reinstated. This was the express ruling of this Court in **Shepherd** v. **Thompson,** 122 U.S. 231, 30 L. ed. 1156, which remains unmodified and unreversed.

In this Shepherd case, a first trial resulted in a verdict and judgment in favor of the Defendant upon instructions of the trial court relative to the issues. This first verdict and judgment for the Defendant had thereafter been set aside upon further judicial finding that the trial court had erroneously instructed the jury. A second trial upon different instructions to the jury, on the identical issue and the same evidence, had resulted in a verdict and judgment in favor of the plaintiff. Upon ultimate appeal to this Court it held that the instructions given the jury by the trial court on the **second trial** (the subject of the appeal) were erroneous and that the issues had been properly submitted to the jury on the first trial by proper instructions. This Court reversed and remanded the case to the Supreme Court of the District of Columbia with directions to set aside the second verdict and to order a new trial. **There too,** insistance was made that the verdict and judgment on first trial be ordered reinstated. In refusing to do so and in holding that

after the Supreme Court of the District of Columbia, upon proper bill of exceptions before it, ordered a second trial **the case stood as if it never had been** tried before, this Court said (p. 1159 of 30 L. ed.):

> "The result is that the judgment below must be reversed, and the verdict against the defendant set aside. It was contended by his counsel that this court should now direct judgment to be entered upon a former verdict, which was returned for him under a correct ruling on the question of acknowledgment, and set aside by the court in General Term upon a different view of the law. In support of this contention was cited Coughlin v. District of Columbia, 106 U.S. 7 (27: 74). But the reason for ordering judgment upon the first verdict in that case was not that the court in General Term had wrongly decided a question of law upon a bill of exceptions allowed at the first trial; but that, as appeared of record, independently of any bill of exceptions, the question had not been legally brought before it at all, thus leaving the first verdict in full force. In the present case, it had authority to entertain and pass the exceptions taken by the plaintiff at the first trial; when, in the exercise of that authority, it had sustained those exceptions and ordered a second trial, the case stood as if it had never been tried before; and only the rulings at the second trial, and no rulings, whether similar or different, at the former trial, could be brought to the General Term by the exceptions of the defendant, or to this court by his writ of error."

Search has revealed no modification of this decision and, indeed, no other instance in which this particular question has been passed upon by this Court.

Absence of further decisions on this question is eloquent testimony of the soundness of the Shepherd decision.

Nothing in **Urie** v. **Thompson,** 337 U.S. 163; 93 L. ed. 1282, cited by the Court in its summary order of November 18, 1957, is either contrary to the sound doctrine of the Shepherd case, supra, or affords any basis for reinstatement of a separate verdict and judgment prior to the verdict and judgment subject to review. In the Urie case it appears there had never been but **one jury verdict and judgment;** a verdict and judgment for the plaintiff employer which the Missouri Supreme Court reversed and which, on review of that specific judgment, this Court ordered reinstated upon its reversal of the action of the Missouri Court which set it aside. The first opinion of the Missouri Court was entered on appeal from the action of the trial court in sustaining demurrer to the complaint, and reversed and remanded the case for trial, holding that while the complaint was insufficient under the Federal Employers' Liability Act (45 U.S.C.A., Section 51), it did state a claim under the Boiler Inspection Act (45 U.S.C.A., Sec. 23, et seq.) After a full trial was had on the amended complaint the verdict and judgment thereon was reversed by the Missouri Court again on a question of pleading — reversing itself and holding the complaint insufficient under the Boiler Inspection Act. The effect of the decision here on review of that latter action was simply to hold that this Court was not precluded from considering the **sufficiency of the**

pleadings by a previous interlocutory order holding the complaint insufficient in part.

It is clear from the action taken in the Urie Case, as well as from the other decisions and authorities cited in the Urie opinion, that this Court's permissible consideration of antecedent judgments or orders in the court of the litigation has validity or propriety only as related to the ultimate conclusion whether the particular judgment under review should be affirmed or reversed.

In connection with the recognized limitations upon the authority of Federal Appellate Courts to order entry of judgments notwithstanding verdicts of juries (even though erroneously instructed in the first instance) attention is invited to the decision in **Aetna Insurance Company** v. **Kennedy**, 301 U.S. 389; 85 L. ed. 1177 (1181), hereinafter more particularly referred to.

(b) The summary order of November 18, 1957 deprives Respondent of its right to a trial by jury and transgresses Respondent's constitutional rights.

The scope of authority of the Courts of the United States in respect to trials by jury is spelled out in the 7th amendment to the Constitution of the United States, which provides, in pertinent part:

> "* * * no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

The limitations imposed by these constitutional provisions upon the appellate Courts of the United States and upon their authority to direct entry of judgment

for one party, notwithstanding the existence of a verdict of the jury and a judgment in favor of the other party, was exhaustively considered by this Court in **Slocum, Executrix** v. **New York Life Ins. Co.**, 228 U.S. 364 (375 et seq.), 57 L. ed. 879.

We shall not undertake to set out either the facts or the extensive canvass of authorities covered in that decision, but call the Court's attention to the summation of its holding (page 894 of 57 L. ed.):

> "In the present case certain well-defined issues of fact were presented by the pleadings, which the plaintiff, as also the defendant, was entitled by the Constitution to have tried to the court and a jury. Such a trial was had and resulted in a general verdict resolving all the issues in the plaintiff's favor. That verdict operated, under the Constitution, to prevent a re-examination of the issues save on a new trial granted by the trial court in the exercise of its discretion, or ordered by the appellate court for error of law. At the trial the defendant requested that a verdict in its favor be directed, and had the court indicated its purpose to do that, it would have been open to the plaintiff, under the then prevailing practice, to take a voluntary nonsuit, which would have enabled her to make a fuller and better presentation of her case, if the facts permitted, at another trial in a new suit. But the defendant's request being denied and a verdict being returned for the plaintiff, she recovered a judgment. That judgment the circuit court of appeals reversed, and rightly so, because the defendant's request, in the state of the evidence, ought, as matter of law, to have been granted. The reversal operated to set aside the

> verdict and to put the issues at large, as they were before it was given. But, instead of ordering a new trial, as was required at common law, the circuit court of appeals itself re-examined the issues, resolved them in favor of the defendant, and directed the judgment accordingly. This, we hold, could not be done consistently with the 7th Amendment, which not only preserves the common-law right of trial by jury, but expressly forbids that issues of fact settled by such a trial shall be re-examined otherwise than 'according to the rules of common law.'"

Certain particular instances in which, under the recognized rules and requirements of the common law, appellate courts could order the entry of judgment notwithstanding the verdicts of juries, were considered by this Court in **Baltimore & C. Line** v. **Redman,** 295 U.S. 645, 79 L. ed. 1636. It is largely to the exceptional instances and particular procedure indicated in the **Redman** decision that the present Rule 50(b) of the Federal Rules of Civil Procedure, applicable only to cases originating in the courts of the United States, owes its origin.

That the principles set forth in the **Redman** case are inapplicable to the situation before the Court in this case, and that the fundamental governing principles stated in the **Slocum** case are here applicable, is clearly shown in the decision of this Court in **Aetna Insurance Co.** v. **Kennedy,** 301 U.S. 389, 81 L. ed. 1177. There, after verdict and judgment in the trial Court in favor of the Defendant (both parties having requested the direction of verdict in their favor), on appeal the Circuit Court of Appeals reversed the trial court and fur-

ther directed the entry of judgment in favor of the Plaintiff for the agreed amount of the loss in question. On review this Court held the action of the Circuit Court of Appeals to be in error in directing entry of judgment notwithstanding the verdict although it affirmed the action of the Court of Appeals in reversing the judgment in favor of the Defendant. In so doing, this Court appropriately held (page 1181 of 81 L. ed.):

> "The verdicts were taken unconditionally. Plaintiff moved for new trials but not for judgments. The court denied her motions and entered judgments for defendants. The Circuit Court of Appeals had jurisdiction to reverse and remand for new trials but was without power, consistently with the Seventh Amendment, to direct the trial court to give judgments for plaintiff. And, as before submission of the case to the jury the trial court denied plaintiff's motion for directed verdicts without reserving any question of law, neither that court nor the Circuit Court of Appeals had jurisdiction to find or adjudge that notwithstanding the verdicts plaintiff was entitled to recover. Slocum v. New York L. Ins. Co., 228 U.S. 364, 387, 57 L. ed. 879, 889, 33 S. Ct. 523, Ann. Cas. 1914D, 1029. Our decision in Baltimore & C. Line v. Redman, 295 U.S. 654, 79 L. ed. 1636, 55 S. Ct. 890, is not applicable.
>
> "There is another reason why the direction of judgments for plaintiff cannot stand. Under the Conformity Act, 28 U. S. C. A. Sec. 724, federal courts follow the practice authorized by state statute, if there be nothing in them that is incongruous with their organization of their fundamen-

tal procedure or in conflict with congressional enactment."

It is interesting to note that in both the **Slocum** and the **Kennedy** cases a statute of the State of Pennsylvania authorized the entry of judgments notwithstanding the verdict in jury cases under various conditions.

Alabama is a common law state, and the right of trial by jury is preserved by its Constitution and laws. There is no constitutional or statutory authorization to the Supreme Court of Alabama to enter judgments notwithstanding the verdict in any case in which it finds the proceedings affected by error or in which it may find the evidence is insufficient to support a verdict and judgment in favor of a party accorded them.

Respondent elected to put on no witnesses on both trials of this case. But by doing so it did not forever waive its right to do so. If the verdict of the jury in its favor be set aside, it has the right to adduce on its behalf any additional evidence it may have and not to be mulct of damages without opportunity to do so at another proper trial.

The summary order of November 18, 1957 deprives Respondent of its right to a jury trial. If the only existing verdict before this Court is to be set aside, then the limit of the Court's jurisdiction is to direct the Court below to grant a new trial, so that this cause might be tried anew under the principles of law promulgated.

3. The summary order of November 18, 1957 is in error in concluding that the record evidence is sufficient to afford a reasonable inference that any neg-

ligence of Respondent operated as the proximate cause in whole or in part of the employee's death.

Whatever may be the variations of factual application, throughout all recent F.E.L.A. decisions of this Court it has stated the controlling doctrine to be that, in order to bottom recovery, the **probative facts** must **reasonably show,** not only a negligent act or omission by the employer, but also that the injury complained of was a reasonably foreseeable consequence of the negligent act or omission complained of. **Ringhiser** v. **Chesapeake & Ohio Railway Co.,** ——U.S.—— 1 L. ed. 2d 1268. In that case the Court found that there was evidence that to the Railroad's knowledge

> " * * * employees used gondola cars for the purpose (for which Ringhiser used the car). In that circumstance there were probative facts from which the jury could find that respondent (railroad company) was or should have been aware of conditions which created a likelihood that the petitioner would suffer just such an injury as he did."

Here the only act or omission involved is the **alleged** negligent "operation" of a train (Count Five, R-18-19, 23). The safety of a place to work, sufficiency or condition of tools or equipment, orders of superiors, etc., are in no way involved. The evidence shows without conflict that Mr. Stinson left his post of duty on the engine while work was in progress and that he never returned to it; that his completely nude body was later found almost a mile from the place he left the standing engine (R. 203-204); that **all** his clothes were "wadded up" on the track about 150 feet from where his body was severed athwart the rail (R. 200) with indications of blood and drag markings in the 150 foot space be-

tween the clothes and the body (R. 205-206); that there were no markings or other indications anywhere on the track between the clothes and where the train had been left standing, nearly a mile away (R. 205-206; 97-101; 116). Plaintiff's evidence also showed without conflict that the deceased left the dining car of the work train ten to fifteen minutes before the train started to back up (R-114-115). Although the evidence showed various others on or about the train between the dining car and the derailment work in the interim, the deceased was not seen on or about the train or scene between the time he left the diner and the time his nude body was later found by a passing train nearly a mile away.

Thus there were no probative facts from which the jury could find that the Respondent railroad company could or should have anticipated the bizarre and wholly mysterious condition under which Mr. Stinson lost his life. And **Ringhiser** is therefore completely distinguishable.

Rogers v. **Missouri Pac. R. Co.,** 352 U.S. 500, 1 L. ed. 2d 493, and **Schulz** v. **Pennsylvania R. Co.,** 350 U.S. 523, 100 L. ed. 668, upon which the Court relied in granting certiorari and overturning the judgment below, are equally distinguishable. In each case a hazardous condition existed, of which the railroad had notice. There was no such condition or circumstance in the instant case.

The Petitioner seeks to bottom her claim of alleged negligence in the operation of the train on two points involving Respondent's operating rules (1) the **mere fact** that the fireman was operating the engine, and (2) whether the engine bell was rung before the train was moved.

The evidence shows without conflict that the fireman operated the engine on the move in question in an efficient and prudent manner (R. 133-134). The applicable rules (R. 139-142) required the engineer to remain on the engine or leave the fireman or other competent person in charge (Rule 972) and that the fireman must comply with the instructions of the engineer while on duty (Rule 990). The evidence shows without dispute that Mr. Stinson left instructions for the fireman to assume the duties of engineer in his absence (R. 189, which included operating the engine as needed (R. 184), as well as backing up down the track to switch out the derailed cars (R. 185, 178-179). The fireman was required to obey these instructions (R. 141, 187), and he did so in an efficient and prudent manner (R. 133, 134).

As to the rule which required the bell to be rung before the train was moved: The rule could have no application to an occurrence which took place nearly a mile distant from where the engine commenced its movement. A failure to ring a bell in compliance with the rule could not afford even a **reasonable inference** of any **foreseeable possibility** that the deceased might be run over nearly a mile away.

In short, the evidence—the probative facts—afford no reasonable inference that any act or omission in the operation of the train operated as a proximate cause in whole or in part of the employee's death. The mere fact of injury and death, without more, is not sufficient to give rise to a presumption of causative negligence on the part of the railroad, and Petitioner's claim is supported by nothing more than sheer speculation, built on successive steps of speculation. This is not permitted by the controlling doctrine of the law as repeatedly affirmed by this Court.

We may here aptly say with the Court in **Eckenrode v. Pennsylvania Railroad Company,** 164 Fed. 2d 996, affirmed 335 U.S. 329, 93 L. ed. 41:

> " * * * But so long as the law is that the defendant must be negligent for the plaintiff to recover for his injuries it is our responsibility to apply the negligence test honestly and not to pretend that there is negligence when it does not exist * * *"

We earnestly submit that there is not the slightest scintilla of evidence in this record of any negligence on the part of this Respondent, in whole or in part proximately causing or contributing to Mr. Stinson's death, and urge that the judgment of the Supreme Court of Alabama affirming the verdict of the jury and the judgment in favor of this Respondent is correct and should stand unmolested.

WHEREFORE, Respondent petitions and moves the Court to withhold the mandate in this case, to withdraw the summary opinion and order of November 18, 1957, and to restore this case to the docket for proper hearing upon all apt questions, as to jurisdiction or the merits, in the manner expressly provided by the rules of this Court.

Respectfully submitted,

PEYTON D. BIBB
NORMAN C. SHEPARD
Attorneys for Respondent.

GRAHAM, BIBB, WINGO & FOSTER
First National Bank Building
Birmingham, Alabama
Of Counsel for Respondent.

CERTIFICATE

I, Norman C. Shepard, hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is confined to substantial grounds not previously presented to the Court, in compliance with Rule 58(2) of the Rules of this Court.

NORMAN C. SHEPARD

CERTIFICATE OF SERVICE

I, Norman C. Shepard, one of the attorneys for the Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 11th day of December, 1957, that I served a full, true and correct copy of the foregoing Petition for Rehearing on Mildred S. Stinson, as Administratrix, etc., Petitioner herein, by mailing such copy in a duly addressed envelope with first class Air Mail postage prepaid to her Attorney of Record, Joseph S. Lord III Esq., addressed as follows:

JOSEPH S. LORD III, Esq.,
c/o Messrs. Richter, Lord & Levy,
Broad and Sansom Streets,
Philadelphia 7, Pennsylvania,

and duly deposited the same in the United States Post Office at Wilmington, North Carolina on said date.

NORMAN C. SHEPARD